1

No. ________

Supreme Court, U.S.
FILED
06-1078 JAN 31 2007
OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

◆

DEJA VU OF NASHVILLE, INC., a Tennessee corporation,
and MERONEY ENTERTAINMENT, INC.,
a Tennessee corporation,

*Petitioners,*

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, TENNESSEE,

*Respondent.*

◆

**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Sixth Circuit**

◆

## PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 217

◆

BRADLEY J. SHAFER
*(Counsel of Record)*
ANDREA E. PRITZLAFF
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
517-886-6560
*Counsels for Petitioners*

MICHAEL F. PLEASANTS
PLEASANTS LAW FIRM
8 South Third, Suite 200
Memphis, Tennessee 38103
901-572-7332
*Co-Counsel for Petitioners*

January 31, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. When attempting, pursuant to *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), to "cast direct doubt" upon a municipality's purported rationale and justification for the enactment of a speech-restrictive law, may a plaintiff take discovery on the question of whether the challenged regulation furthers an important or substantial governmental interest? In a published opinion, the Sixth Circuit answered: "No."

2. In light of the highly-fractured and plurality nature of this Court's three most recent opinions concerning the "secondary effects" doctrine, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *Alameda Books*, which has engendered significant confusion in the lower courts, should this Court revisit the evidentiary standards and burdens under that doctrine?

3. In a case where a district court converts a preliminary injunction into a permanent injunction and final judgment without further adjudication and without conducting a trial on the merits in regard to the plaintiff's challenges to the constitutionality of a municipal ordinance, and where the permanent injunction/final judgment is later vacated, is the plaintiff then entitled to litigate the merits of his or her claims?

# LIST OF PARTIES BELOW/PARENT COMPANIES AND NON WHOLLY OWNED SUBSIDIARIES (PURSUANT TO RULE 14.1(B))

The parties to the Sixth Circuit action below were: Deja Vu of Nashville, Inc., Michael Rucker, Michael Butler, Meroney Entertainment, Inc. d/b/a Ken's Gold Club, The Pleasure Palace, Inc., Dawn Pierce, and Elizabeth Martz (Appellants); and Metropolitan Government of Nashville and Davison County, Tennessee (Appellee).

Petitioner Deja Vu of Nashville, Inc., states that its parent corporation is Dynamic Industries, Ltd., a Delaware (non-public) corporation. There is no publicly held company owning 10% or more of the stock of Deja Vu of Nashville, Inc.

Petitioner Meroney Entertainment, Inc., states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of Meroney Entertainment, Inc.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED .......... i

LIST OF PARTIES BELOW/PARENT COMPANIES AND NON WHOLLY OWNED SUBSIDIARIES (PURSUANT TO RULE 14.1(B)) .......... ii

TABLE OF CONTENTS .......... iii

INDEX OF AUTHORITIES .......... v

PETITION FOR A WRIT OF CERTIORARI .......... 1

OPINIONS BELOW .......... 1

JURISDICTION .......... 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED .......... 2

STATEMENT OF THE CASE .......... 2

REASONS FOR GRANTING THE WRIT .......... 12

I. THE HIGHLY-FRACTURED NATURE OF THIS COURT'S PLURALITY OPINIONS REGARDING THE "SECONDARY EFFECTS" DOCTRINE HAS LED TO SIGNIFICANT CONFUSION IN THE LOWER COURTS .......... 12

II. THE LACK OF CLARITY FROM THIS COURT HAS RESULTED IN A BODY OF DECISIONS THAT RENDER IT VIRTUALLY IMPOSSIBLE TO CHALLENGE A PURPORTED SECONDARY EFFECTS JUSTIFICATION FOR A LAW THAT RESTRICTS PROTECTED EXPRESSION .......... 20

TABLE OF CONTENTS – Continued

Page

III. THE SIXTH CIRCUIT'S OPINION PERMITS THE GOVERNMENT TO WITHHOLD THE TRUTH AND TO ENACT SPEECH-RESTRICTIVE REGULATIONS BASED UPON FALSEHOODS AND "SHODDY DATA OR REASONING" .......... 23

IV. THIS COURT SHOULD PROTECT THE RIGHT OF A LITIGANT TO HAVE HIS OR HER CLAIMS DETERMINED ON THE MERITS .......... 27

CONCLUSION .......... 29

## TABLE OF AUTHORITIES

Page

CASES:

*BZAPS, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002) ................ 18

*Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) ("*Baby Tam I*") ...................................... 28

*Baby Tam & Co. v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) ("*Baby Tam II*") .................................... 28

*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)....12, 13, 20

*Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003) ............................................................... 13

*Byran Clark v. City of Lakewood*, Case No. C98-5341 RJB (W.D. Wash.) .................................................. 25

*City of Chicago v. Pooh Bah Enterprises, Inc.*, ___ N.E.2d ___, 2006 WL 2827608 (Ill. Oct. 5, 2006).......... 19

*City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) ("*Pap's II*") ........................................................12, 15, 23

*City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) ........................................................ 9

*City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)..............................................12, 15, 17, 23, 26

*Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001) ............................................................................. 26

*Commonwealth v. Jameson*, ___ S.W.3d ___, 2006 WL 3386489 (Ky. Nov. 22, 2006) .................................... 13

*D. Russo, Inc. v. Township of Union, New Jersey*, Superior Court of New Jersey Law Divisions: Docket No. UNN-L-2313-06, September 16, 2006........ 26

TABLE OF AUTHORITIES – Continued

Page

*Daytona Grand v. Daytona Beach*, 410 F. Supp.2d 1173 (M.D. Fla. 2006) ..... 16

*Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6th Cir. 2001) (*"Deja Vu I"*), *cert. denied*, 535 U.S. 1073 (2002) ..... 1, 9, 10, 21, 28

*Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, No. 05-5895, 2006 WL 1716720 (6th Cir. June 22, 2006) ..... 14

*Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 466 F.3d 391 (6th Cir. 2006) ..... 1, 10, 11, 19, 28

*DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) ..... 17, 21, 23

*Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006) ..... 15

*Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003) ..... 18

*Erie Boulevard Triangle Corp. v. City of Schenectady*, 250 F. Supp.2d 22 (N.D.N.Y. 2003) ..... 24

*Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272 (10th Cir. 2002), *cert. denied*, 537 U.S. 947 (2002) ..... 21

*Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546 (5th Cir. 2006) ..... 21

*Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998) ..... 21

*Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002) ..... 24

TABLE OF AUTHORITIES – Continued

Page

*Flanigan's Enterprises, Inc. v. Fulton County*, 2006 WL 2927532 (N.D. Ga. Oct. 12, 2006)................16, 24, 25

*Freedman v. Maryland*, 380 U.S. 51 (1965)........................ 3

*G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003), *cert. denied,* 543 U.S. 812 (2004)............................................................... 16

*Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 374 (2005) ..........17, 19

*Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) ........................................................... 21

*H&A Land Corp. v. City of Kenndale, Texas*, 2005 WL 723690 (N.D. Tex. March 29, 2005)........................ 26

*Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003) ........................................................ 14

*ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994)................................................................... 18

*Jameson v. Commonwealth*, No. 2003-CA-000967-DG, 2004 Ky. App. LEXIS 229 (August 6, 2004) ..17, 21, 23

*J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998)............................................... 22

*Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp.2d 672 (W.D. Ky. 2002)............ 18

*Marks v. United States*, 430 U.S. 188 (1977).................... 13

*Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) .................................. 22

*Mitchell v. Commission on Adult Entertainment Establishments of Delaware*, 10 F.3d 123 (3rd Cir. 1993)................................................................... 21

## TABLE OF AUTHORITIES – Continued

Page

*Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) (*"Pap's I"*) ........ 13

*Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002) (*"Pap's III"*) ........ 14

*Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) ........ 13, 16, 24

*R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004) ........ 26

*Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ........ 12, 14, 18

*SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003) ........ 13, 16, 21

*Schneider v. New Jersey*, 308 U.S. 147 (1939) ........ 22

*Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987) ........ 18

*Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) ........ 13

*United States v. O'Brien*, 391 U.S. 367 (1968) ........ 12

*University of Texas v. Camenisch*, 451 U.S. 390 (1981) ........ 27

*Ward v. Rock Against Racism*, 491 U.S. 781 (1989) ........ 22

*World Wide Video, Inc. v. City of Tukwila*, 816 P.2d 18 (Wash. 1991) ........ 18

*World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004) ........ 22

*Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998) ... 10, 18

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

United States Constitution, First Amendment.......1, 19, 23

United States Constitution, Fourteenth Amendment........................................................................ 1

STATUTES, LEGISLATIVE HISTORY, AND ORDINANCES:

28 U.S.C. § 1254(1) ........................................................ 1

42 U.S.C. § 1983 .............................................................. 1

Tenn. Code Ann. § 27-9-111(e) ..................................4, 9, 10

Chapter 6.54 of the Metropolitan Code of Laws .......*passim*

Metropolitan Government of Nashville and Davidson County Bill No. 097-796............................................. 1, 3

FEDERAL RULES OF CIVIL PROCEDURE:

Fed.R.Civ.P. Rule 30(b)(6) .............................5, 19, 20, 22

Fed.R.Civ.P. Rule 65(a)(2) ........................................ 6, 28

FEDERAL RULES OF EVIDENCE:

F.R.E. Rule 102.......................................................... 23

OTHER AUTHORITIES:

*An Examination of the Assumption That Adult Businesses Are Associated With Crime In Surrounding Areas: A Secondary Effects Study In Charlotte, North Carolina*, 38 Law & Society Review, No. 1 (2004)................................................ 24

TABLE OF AUTHORITIES – Continued

Page

Enriquez, *A Legal and Empirical Perspective of Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol'y & L. 1 (2006) .................................... 24

Linz, *Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California*, 43 The Journal of Sex Research 182 (2006) .......................................... 24

Paul, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking The Legal Myth of Negative Secondary Effects,* 6 Communication Law and Policy No. 2 (2001) ................................................................ 15

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Deja Vu of Nashville, Inc. ("*Deja Vu*") and Meroney Entertainment, Inc. ("*Ken's Gold Club*"), respectfully pray that a writ of certiorari be issued to review the amended ruling of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 12, 2006.

◆

## OPINIONS BELOW

The Judgment and amended opinion of the United States Court of Appeals for the Sixth Circuit is reported as *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 466 F.3d 391 (6th Cir. 2006) (App. 1-15); the original opinion was unreported and appears at App. 16-29; and an earlier opinion of the Sixth Circuit was reported at 274 F.3d 377 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002) (App. 30-77). The district court's opinions and orders are unreported, and include an Order and Memorandum granting the Plaintiffs' second motion for preliminary injunction (App. 149-201); an Order modifying the preliminary injunction into a permanent injunction and granting final judgment to the Plaintiffs (App. 202-03); and a memorandum and order vacating the permanent injunction and granting final judgment. (App. 207-16).

Other orders of the district court and the Magistrate Judge are discussed below.

◆

## JURISDICTION

Pursuant to a timely filed motion for panel rehearing, the Sixth Circuit entered an amended opinion on October 12, 2006. It subsequently denied the motion for rehearing in an order dated November 3, 2006. App. 217. This petition is filed within 90 days of that date and, in any event, Justice Stevens granted an extension to file this petition until February 1, 2007. This Court therefore has jurisdiction to review the amended ruling of the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

◆

## CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The text of the First Amendment to the United States Constitution is found at App. 218, and the Fourteenth Amendment is reproduced at App. 219-20. In addition, the provisions of 42 U.S.C. § 1983 are found at App. 221.

Chapter 6.54 of the Metropolitan Code of Laws (the ordinance scheme underlying Plaintiffs' challenges below) has undergone numerous changes during the pendency of this litigation. It was originally enacted by Bill No. 097-796 (App. 226-91), and the current version of the Ordinance incorporating numerous amendments is found at App. 292-351.

◆

## STATEMENT OF THE CASE

The proceedings below arose out of actions commenced pursuant to 42 U.S.C. § 1983, which challenged the constitutionality of an ordinance adopted by the Metropolitan

Government of Nashville and Davidson County, Tennessee ("Metro"), generally known as Chapter 6.54 ("Ch. 6.54," or simply the "Ordinance"). The Ordinance requires the licensing of, and otherwise further regulates, certain "adult" businesses and individuals associated with them, and the original version thereof was enacted through the adoption of Bill No. 097-796 on August 19, 1997, which is found at App. 226-91.

Through the enactment of Ch. 6.54, Metro has devised what appears to be a one-of-a-kind licensing gauntlet through which applicants must pass in order to be able to engage in protected expression. They must apply to, and appear in public before, the "Sexually Oriented Business Licensing Board" (here, simply the "Board") comprised of political appointees selected by the Mayor. § 6.54.020(B)(1) (App. 299).

On October 17, 1997, before individuals and businesses were required to submit applications for licenses, the Plaintiffs (Petitioners here) and others filed suit seeking to have Ch. 6.54 enjoined and declared unconstitutional, and submitted contemporaneously therewith a motion for preliminary injunction limited to a claim that the Ordinance failed to contain the requisite procedural guarantees mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965). Pursuant thereto, the Honorable John T. Nixon[1] entered an order enjoining Ch. 6.54 in its entirety. App. 78-98.

---

[1] Over nine years, the district court proceedings have been handled by four judges. Because the Sixth Circuit claims that certain matters "slipped through the cracks" as this case was repeatedly reassigned (App. 13), Plaintiffs will identify the actions of the district judges using their names.

Following the enactment of amendments to Ch. 6.54 and the adoption by the Tennessee legislature of a "judicial review" statute (T.C.A. § 27-9-111(e), found at App. 222-23), Metro filed a motion to dissolve the preliminary injunction, which the district court granted. App. 131-48. Plaintiffs appealed that ruling

The Plaintiffs then filed a second motion for preliminary injunctive relief that, at the insistence of Metro and pursuant to court order (App. 129), included therein all of the other constitutional challenges that they desired to litigate by way of preliminary injunction proceedings. Plaintiffs were not, of course, required in that limited submission to bring forth all of their claims against the Ordinance – irrespective of whether they were ripe for adjudication at the preliminary injunction stage – and they did not. Significantly, Plaintiffs did not at that time ask the court to consider its claim that there was an insufficient "secondary effects" basis for the enactment of the Ordinance, nor did Plaintiffs fully litigate their assertion that Ch. 6.54 vested the licensing authorities with unbridled discretion[2] in that discovery had not been completed and much of the governmental conduct that supported the contention did not take place until *after* the preliminary injunction hearing.

---

[2] Following the lifting of the first preliminary injunction, Judge Nixon took senior status and the case was reassigned to the Honorable Althea Trauger. Shortly thereafter, however, Judge Trauger recused herself when she came to understand that Plaintiffs' challenges would include an attack upon the political appointee makeup of the licensing Board, and as a result of her husband being personal counsel to the Mayor and the fact that she had personal knowledge of the criteria that the Mayor used for appointing members to such boards. App. 363-65. The case was then assigned to the Honorable Thomas A. Higgins.

No secondary effects challenge was raised at that time because the parties were then involved in a dispute regarding the discovery that Plaintiffs were entitled to take on that issue. Chapter 6.54 was purportedly adopted out of a concern of the "adverse secondary effects" of adult entertainment establishments (App. 228-36, at Section 1(B) ("Findings")), and Plaintiffs' challenge thereto was raised at an early scheduling conference, with the resulting Case Management Order stating:

> Limited discovery will be needed in the following areas:
>
> * * *
>
> b. Documents, studies or other evidence filed with the Metropolitan Council or any committees thereof relating to its consideration of Metropolitan ordinance No. 097-796, *including secondary effects of adult entertainment establishments and any nexus between the Ordinance and perceived secondary effects.*

App. 100-01 (emphasis added).

Pursuant to this order, Plaintiffs propounded document requests (App. 382-89) and served Defendants with a "Notice of Depositions of Representatives of the Metropolitan Government of Nashville and Davidson County" pursuant to Fed.R.Civ.P. Rule 30(b)(6). This notice consisted of thirty-nine specified areas – many of which involved "secondary effects" matters – that the Plaintiffs desired to investigate. App. 374-81. Metro agreed to produce deponents for inquiries 1-4, 20, 34 and 37.

However, the Defendants filed a motion for protective order objecting to the remainder of the notice. With one limited exception permitting only the access to certain *documents* (regarding Request 32, which sought a *deponent* to testify about certain criminal statistics), the Magistrate Judge granted the Defendants' motion for protective order (App. 111-27), and precluded the Plaintiffs from being able to investigate both the purported "secondary effects" of adult entertainment facilities in Nashville and any evidence that the government had in regard to whether and how the regulations as contained in Ch. 6.54 would alleviate those problems. The Plaintiffs filed a motion with the district court to review the decision of the Magistrate, but Judge Higgins never ruled on that motion – either before considering the second motion for preliminary injunction or before entering final judgment.

The second motion for preliminary injunction was litigated in a three-day evidentiary hearing between April 13 and 15, 1999. At no time prior to the conclusion of that proceeding did Judge Higgins ever provide notice, or otherwise indicate, that he was combining the hearing on the preliminary injunction motion with a trial on the merits as is permitted by Fed.R.Civ.P. Rule 65(a)(2). Following the evidentiary hearing, but before the district court ruled on the motions, Metro enacted fifty-two additional changes to Ch. 6.54.

Irrespective of the evidentiary hearing, however, because Judge Nixon had previously vacated the first preliminary injunction, the Plaintiffs were then required to apply for licenses under the Ordinance. These administrative proceedings, which occurred *subsequent* to the preliminary injunction hearing, were anything but "ministerial." For example, at the April 27, 1999, meeting of the Board, *Deja Vu*'s application for a license was denied in part because the application inspection "indicates that the couches need to be cleaned. Sanitation of the floors and cubicles need to be improved. Covered waste containers need to be provided throughout the establishment. The commode in the dressing room needs to be cleaned. And the shower stall in the dressing room needs to be cleaned. . . ."[3] Additionally, the Board discussed the fact that another inspection found that "the dancers were in violation of the '3-foot rule.'"[4] App. 390-91. Based on these subjective criteria, the Board voted unanimously to deny the license application. *See* App. 392. Other licenses were denied for similar, discretionary reasons.[5]

Moreover, the Board members could not even *agree* on whether various licenses should be issued. In fact, some licenses were "*granted*" merely because there was not a *majority* vote to *deny* them. For example, *Deja Vu* requested an evidentiary hearing regarding the denial of its license application, during which a motion to approve a license failed for lack of a "second." App. 414-15. A subsequent motion to *deny* the application received *two votes in favor of denial and two votes against denial*. App. 415-17. Yet, the written decision by the Board stated that although no vote favored granting the license, the license would nevertheless be granted. App. 420-21. In any event, the license was *granted* because there was a *2-2 tie* in the voting to *deny* the application.[6] And, even the director of the Department of Codes administration, Terry Cobb, expressed his frustration at the way the Board was continually adopting new rules and regulations and definitions, commenting that "this seems up to this point to be a constantly changing process, what – *the meaning of words change on an ongoing basis. . . .*" App. 418-19 (emphasis added).

---

[3] In fact, the inspection that ultimately served as a basis for the Board to deny *Deja Vu*'s application was a "health inspection" that – probably not coincidently – occurred at a lunch break during the district court preliminary injunction hearing. Immediately thereafter, Mike Rucker, the then-general manager of *Deja Vu*, re-took the witness stand to testify about the health inspection that had just taken place and a *general* health inspection the club had undergone *only eight days before* where it received a "score" of *99 out of 100*; the only "gig" being for a broken floor tile behind the bar. During the earlier inspection, *none* of the concerns noted by the inspector on the day of the court hearing were even *raised* by the health inspector. App. 405-08.

[4] Section 6.54.140(C) precludes dancing within "three feet" of a customer, but does not indicate how that distance is to be measured.

[5] The transcript of the April 27, 1999, Board meeting illustrates licenses being denied for such subjective reasons as not having clean walls and clean storage areas (App. 392-93), not eliminating "all unnecessary items on lower level" (App. 393), not having clean showers and not eliminating storage that may attract rodents and insects (App. 394), and not having "tight fitting lids or covers" on all garbage containers (App. 396).

Separate from these administrative "proceedings," Judge Higgins granted the second motion for preliminary injunction and enjoined the Ordinance in its entirety. App. 149-201. Later, he conducted a status conference to prepare the case for trial, and expressed his frustration at the seemingly never-ending array of amendments to the Ordinance. App. 425-26, 434. Judge Higgins then suggested that he might simply issue an order converting the preliminary injunction into a permanent injunction and final judgment (App. 426), to which both sides objected. *See, e.g.*, App. 426-37. Nevertheless, Judge Higgins later entered an order modifying the preliminary injunction into a permanent injunction and granting final judgment in favor of the Plaintiffs. App. 202-03. Chapter 6.54 was permanently enjoined in its entirety.

---

[6] *Deja Vu*'s license was not the only one that received a split vote by the Board Members. *Ken's Gold Club* received a license on a two-to-one vote. App. 414. In fact, that establishment had its application previously *denied* on a two-to-one vote. App. 412.

Following the enactment of additional amendments to Ch. 6.54, Metro appealed the order granting the permanent injunction, and the Plaintiffs cross-appealed. Those appeals were consolidated with Plaintiffs' appeal of Judge Nixon's ruling lifting the first preliminary injunction.

The Sixth Circuit issued an opinion on December 6, 2001, affirming in part and reversing in part, but maintaining the injunction in place. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6th Cir. 2001) ("*Deja Vu I*"), *cert. denied* 535 U.S. 1073 (2002). App. 30-77. In regard to a portion of Plaintiffs' appeal concerning the Magistrate Judge's discovery ruling, the Sixth Circuit declined to address the propriety of that order "before the district court has had a chance to review it." *Id.* at 403. And, by that time, Judge Higgins had taken senior status, and the case had been reassigned to the Honorable Todd Campbell.

In light of the various rulings of the Sixth Circuit, Metro enacted an additional series of amendments to Ch. 6.54, with the revised codified version of the Ordinance appearing at App. 292-351. In addition, the Tennessee legislature adopted *conditional* revisions to T.C.A. § 27-9-111(e), which were to take effect, however, only in the event that this Court denied Metro's petition for a writ of certiorari on the judicial review issue. *See, e.g.*, App. 224-25. Metro did, indeed, file a petition for a writ of certiorari in this Court, which was denied on May 13, 2002. 535 U.S. 1073 (2002).

Two years later, this Court rendered its ruling in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S.

774 (2004). On February 25, 2005, which was over eight months following the ruling in *Z.J. Gifts* – but five years and one month after Ch. 6.54 was amended to purportedly correct the constitutional deficiencies noted by the Sixth Circuit in *Deja Vu I*, and two years and nine months from the date that the amendments to T.C.A. § 27-9-111(e) went into effect (that being as of this Court's denial of Metro's petition for a writ of certiorari) – Metro filed a motion to lift the permanent injunction predicated, in part, upon this Court's ruling in *Z.J. Gifts*.

While Metro did not cite any specific court rule as the basis for its motion, Plaintiffs responded by arguing that in addition to the untimeliness of the motion, lifting the permanent injunction would have the consequent effect of vacating the judgment, which in turn would place the district court proceeding in the position of having been litigated through the preliminary injunction process – thereby permitting the Plaintiffs to move forward with the other challenges that they had to the constitutionality of Ch. 6.54 but which had not been included as part of their second motion for preliminary injunction (such as the "secondary effects" challenge and certain aspects of their "unbridled discretion" argument). Plaintiffs also pointed out that if the court was inclined to vacate the judgment, it would then have to address the Magistrate's ruling relating to the secondary effects discovery dispute that the Sixth Circuit, in *Deja Vu I*, had specifically indicated should be first addressed by the district court.

Nevertheless, Judge Campbell entered an order not only vacating the permanent injunction, but also *reentering* final judgment (this time *against* the Plaintiffs), thereby precluding the Plaintiffs from ever having a trial on the merits. App. 207-16. The Plaintiffs appealed and on

June 22, 2006, the Sixth Circuit entered an opinion affirming the decision below. App. 16-29 ("*Deja Vu II*"). In that ruling, the appellate court concluded that Judge Campbell's entry of final judgment was appropriate because the Plaintiffs had litigated all of their claims as part of their second motion for preliminary injunction, including their "secondary effects" attack. App. 27-29.

The Plaintiffs timely filed a motion for panel rehearing and provided the Sixth Circuit with an index of the briefing on the second motion for preliminary injunction (App. 366-73), the testimony submitted in support thereof, as well as the proposed findings of fact and conclusions of law submitted by the Plaintiffs below *prior* to the commencement of the evidentiary hearing; all of which established beyond any question that Plaintiffs had not even *raised* a secondary effects challenge as part of their second motion for preliminary injunction, let alone litigated such a claim at the hearing. All that occurred at the preliminary injunction hearing in regard to the secondary effects issue was that Metro submitted, without objection, the "evidence" that it claimed to have relied on when enacting Chapter 6.54. App. 402-03, 409.

The Sixth Circuit then issued an amended opinion on October 12, 2006, once again affirming the district court. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 466 F.3d 391 (6th Cir. 2006) ("*Deja Vu III*"). App. 1-15. The reasoning, however, changed. Now, the Sixth Circuit stated that the Plaintiffs were precluded from litigating their secondary effects challenge for two reasons. First, in his ruling on the second motion for preliminary injunction (subsequently converted into the permanent injunction), Judge Higgins had discussed the secondary effects justification for the

Ordinance. Second, further litigation was unnecessary because Plaintiffs were precluded from undertaking any discovery on the secondary effects issue. App. 12-14. And, on November 3, 2006, the Sixth Circuit entered an Order denying the motion for rehearing. App. 217.

This petition follows.

◆

## REASONS FOR GRANTING THE WRIT

### I. THE HIGHLY-FRACTURED NATURE OF THIS COURT'S PLURALITY OPINIONS REGARDING THE "SECONDARY EFFECTS" DOCTRINE HAS LED TO SIGNIFICANT CONFUSION IN THE LOWER COURTS.

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court declared that the enactment of zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments. These laws would be declared constitutional if they were "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47. Since *Renton*, however, this Court's decisions regarding the application, and indeed expansion, of the "secondary effects" doctrine have comprised of a trio of highly-fractured plurality opinions: *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (*"Pap's II"*); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

The pluralities in *Barnes* and *Pap's II* determined that the constitutionality of nudity prohibitions should be evaluated pursuant to the intermediate scrutiny test for symbolic speech set forth in *United States v. O'Brien*, 391

U.S. 367 (1968), which analyzed: 1) Whether the regulation at issue is within the government's constitutional power; 2) whether the regulation furthers an important or substantial governmental interest; 3) whether the governmental interest is unrelated to the suppression of free expression; and 4) whether the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *Id.* at 377. Yet, lower courts have had great difficulty in discerning how these three plurality rulings are to be applied.

In attempting to employ the test of *Marks v. United States*, 430 U.S. 188, 193 (1977) (the "holding" of a plurality decision "may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds"), a number of courts have recently devoted entire portions of their opinions just trying to decipher what these split decisions mean. *See, e.g., Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1259-64 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 717-22 (7th Cir. 2003); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 860-64 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003); and *Commonwealth v. Jameson*, ___ S.W.3d ___, 2006 WL 3386489 (Ky. Nov. 22, 2006), at **10-17. *See also Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) ("*Pap's I*") (attempting to determine the holding of *Barnes*). And, courts have also noted the difficulty in applying *Marks* to these decisions when there is no one opinion that can be considered to express the consensus of a majority of Justices. *See, e.g., Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994). This has resulted in conflicting rulings below in regard to both the government's burden of justifying such laws and the type of evidence that is necessary to successfully challenge such claims.

As noted by this Court in regard to the governmental interest prongs of *Renton/O'Brien*, before enacting a secondary effects-based law a city or state need not conduct new studies or produce evidence independent of that already generated by other municipalities in regard to such perceived problems, "so long as whatever ***evidence*** the [government] relies upon is ***reasonably believed to be relevant*** to the problem that [it] addresses." *Renton*, 475 U.S. at 51-52 (clarification and emphasis added). But, how a court determines if this standard is met is not self-apparent.

In fact, in rejecting – as a result of this confusing body of case law – this Court's secondary effects jurisprudence as a basis for interpreting its State's free speech rights, the Pennsylvania Supreme Court observed that it is "notable that the five Justices in the U.S. Supreme Court [in *Pap's II*] who agreed that the *O'Brien* test applied ***could not agree upon the precise evidentiary showing which would be required to satisfy that test***." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 609-10 (Pa. 2002) ("*Pap's III*") (clarification and emphasis added). *See also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) ("The standards for the *quantity and nature* of the empirical evidence needed to uphold a city ordinance based on the negative secondary effects of sexually oriented speech in general, or nude dancing in particular, are *continuing to evolve*") (emphasis added).

The conflict concerning a litigant's ability to challenge the governmental interest claims underlying a secondary effects-based law is the most problematic. The theoretical right to mount such an attack is clearly established. *Pap's II* noted that the business challenging the law there had been given "ample opportunity to contest the [city] council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court." *Pap's II*, 529 U.S. at 298 (clarification added). Later, in *Alameda Books*, the plurality observed – after noting that *Renton* had not set an *initial* high evidentiary bar for municipalities when attempting to justify such laws – that:

> This is not to say that a municipality can get away with *shoddy data or reasoning*. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to ***cast direct doubt*** on this rationale, ***either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings***, the municipality meets the standard set forth in *Renton*.

*Alameda Books*, 535 U.S. at 438-39 (emphasis added).

However, respectfully, this Court has provided no clear guidance on how a plaintiff may satisfy *either* standard, which has led to conflicting opinions concerning not just the *weight* of evidence that is necessary to "cast direct doubt," but also the form of contradictory evidence that is even *relevant* to meeting these standards.

For example, in *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1169 n.24 (10th Cir. 2006), the Tenth Circuit observed that the mere submission of the article Paul, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking The Legal*

*Myth of Negative Secondary Effects,* 6 Communication Law and Policy No. 2 (2001), which analyzed the secondary effects reports generally relied upon by municipalities when enacting "adult" business regulations and found them to be seriously and often fatally flawed, might alone cast doubt upon a city's evidence and rationale. But in *SOB, Inc.*, 317 F.3d at 862-63, where the Eighth Circuit found that this article, *plus* testimony that an adult business that had been in operation for eight years had neither caused higher crime rates nor depressed the value of nearby properties, was insufficient. The Seventh Circuit came to basically the same conclusion in *G.M. Enter., Inc. v. Town of St. Joseph*, 350 F.3d 631, 635-36, 639 (7th Cir. 2003), *cert. denied,* 543 U.S. 812 (2004).

-More to the point, in *Flanigan's Enter., Inc. v. Fulton County*, 242 F.3d 976, 986 (11th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), *Peek-A-Boo Lounge,* 337 F.3d at 1272, and *Daytona Grand v. Daytona Beach* 410 F. Supp.2d 1173, 1184 (M.D. Fla. 2006), for example, the courts determined that expert witness testimony describing localized empirical studies that negated a connection between adverse secondary effects and "adult" businesses can indeed rebut the governmental presumption. However, other courts come to the exact opposite result when confronted with basically the same evidence. *See, e.g.*, *G.M. Enter.*, 350 F.3d at 635-36, 639 (a local study which established that the surrounding county "[h]ad not experienced any major problems with adult entertainment establishments," an affidavit stating that property values near the club had increased over time, an affidavit which established that the majority of police calls regarding incidents at the club were generated during hours when no nude or semi-nude dance entertainment was offered, and a statement by the local sheriff that the volume of police calls generated by the club was unrelated to nude dancing, was all irrelevant as *"[a]lthough this evidence shows that the Board might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process"*); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (the district court *"properly rejected"* expert testimony and other evidence demonstrating that there was in fact no correlation between the plaintiff's establishment being open 24 hours a day and crime because it "merely contradicts other evidence that the Hallie Board ***could*** have reasonably relied upon"); and *Jameson*, 2006 WL 3386489, at **21-25 (Kentucky Supreme Court declaring that the "cast direct doubt" standard is a "heavy burden" to overcome, stating that *Alameda Books* does not support the conclusion that a finding of a lack of *local* secondary effects shifts the burden, and concluding that evidence in the form of testimony by a chief dispatcher of the police department showing that adult businesses were not the situs of elevated crime and a real estate agent observing that real estate values in the area of the adult businesses actually increased, was insufficient to meet the burden shifting standard[7]) (all emphasis added). *See also Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 374 (2005) (Ninth Circuit ignored proffered expert testimony that the studies on which the city relied were "flawed and irrelevant" and did not conform to the methodological criteria suggested by the appellants' expert, as that was "simply not the law"), and *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp.2d 672, 679-80 (W.D. Ky. 2002) (evidence challenging the reliability and probativity of the reports which the city relied upon, empirical studies conducted in other municipalities that found no connection between adult uses and adverse secondary effects, and compilation of police data showing no local increase in crime, did not disprove that the enactment of the ordinance may reduce criminal activity).

---

[7] The testimony submitted by *Jameson* is described in slightly greater detail in the Court of Appeals opinion found at *Jameson v. Commonwealth*, No. 2003-CA-000967-DG, 2004 Ky. App. LEXIS 229, at *29 (August 6, 2004).

The appellate courts also disagree on whether the generally relied upon secondary effects reports examining adults bookstores and live entertainment venues can be used to justify regulations of "take out" only facilities where there is no viewing of adult entertainment on the premises. *Cf. Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 293-95 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003), and *World Wide Video, Inc. v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991) (they cannot); *with Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998), and *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994) (they can). And, there is even a conflict in the circuits concerning whether the secondary effects "reliance" component of *Renton* can be used to legitimize the extension of regulations so that they apply to a business that presents "adult" entertainment on only a *single* occasion. *Cf. BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 606-07 (8th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002) (yes); *with Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987) (no).

This confusion has even led at least two appellate courts to recently state that they simply "will not specify the methodological standards to which [a litigant's] evidence must conform" in order to successfully challenge the stated secondary effects basis for the enactment of a speech-restrictive law. *See City of Chicago v. Pooh Bah Enter., Inc.*, ___ N.E.2d ___, 2006 WL 2827608 at *20 (Ill. Oct. 5, 2006); and *Gammoh*, 395 F.3d at 1126 (clarifications added).

The decision of the Sixth Circuit, which forecloses even *discovery* on these critical issues, is the culmination of the confusion wrought by the lack of majority consensus by the Justices of this Court in regard to this doctrine. Demonstrating this discord is the plain fact that subsequent to and irrespective of the Sixth Circuit's discovery ruling in *Deja Vu III*, district courts outside of the Sixth Circuit are ignoring that decision and are continuing to allow discovery on these important matters. *See* App. 438-50 (Rule 30(b)(6) deposition notice, transcript and ruling on a motion for clarification/reconsideration of a protective order, where the district court ultimately permitted the requested discovery pursuant to a deposition notice virtually identical to the one at issue here (App. 374-81), and where the court even declined to hear argument on the applicability of *Deja Vu III* (App. 446-47)); and App. 463-68 (district court also ordering the taking of a Rule 30(b)(6) deposition).

The protection of First Amendment rights from governmental erosion warrants clearer direction from this Court on these evidentiary standards, and this petition should, therefore, be granted.

## II. THE LACK OF CLARITY FROM THIS COURT HAS RESULTED IN A BODY OF DECISIONS THAT RENDER IT VIRTUALLY IMPOSSIBLE TO CHALLENGE A PURPORTED SECONDARY EFFECTS JUSTIFICATION FOR A LAW THAT RESTRICTS PROTECTED EXPRESSION.

The Sixth Circuit's "no discovery" ruling – which even eviscerates the discovery that Metro *agreed* to provide – virtually ensures that a litigant will be unable to "cast direct doubt" upon a government's rationale for enacting a secondary effects-based law. Simply put, a litigant cannot "cast doubt upon" the government's rationale if it cannot discern what that rationale is.[8] But, that cannot be accomplished absent discovery, and the inability to "cast direct doubt" without such discovery is guaranteed because of the highly-fractured nature of *Barnes* and the fact that Justice Souter's concurrence is generally considered to be the "holding" of that decision.

In Justice Souter's view, a governmental interest need not be identified at the time of the enactment of a regulation, but may be established later during litigation. *Barnes*, 501 U.S. at 582 ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a ***current*** governmental interest in the service of which the challenged application may be constitutional") (Souter, J., concurring) (emphasis added). Utilizing *Marks*, numerous courts adopt this precept.[9]

---

[8] Here, the Rule 30(b)(6) deposition notice requested a witness to testify about these alleged governmental interests. App. 376-80 (No.'s 1-17, 23-29, 32 and 33).

Accordingly, without being able to undertake discovery in order to at least determine what secondary effects the government contends substantiate the enactment – ***or continued existence*** – of a particular regulation, a plaintiff can appropriately "cast doubt upon" the secondary effects as may be articulated in a bill's legislative preambles but nevertheless find himself or herself losing the constitutional challenge when another secondary effect is used in litigation to justify the law. *See, e.g.*, *SOB, Inc.*, 317 F.3d at 862-63 (Eighth Circuit describing the limited governmental concerns in the legislative preambles, and ignoring submitted studies of crime and property values because the plaintiffs' "local evidence addressed only two adverse secondary effects, property values and crime in the vicinity of an adult entertainment establishment. These are issues particularly relevant to zoning. A ban on live nude dancing, on the other hand, ***may address*** other adverse secondary effects, such as the likelihood that an establishment whose dancers and customers routinely violate long-established standards of public decency will foster illegal activity such as drug use, prostitution, ***tax evasion and fraud***"[10]); and *World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1190, 1195 (9th Cir. 2004) (adult business zoning ordinance challenged with evidence that included a declaration – together with supporting data – that the adult businesses in Spokane neither contributed to the depreciation of property values nor resulted in increased calls for police service, with the Ninth Circuit concluding that the plaintiff had not succeeded in "casting direct doubt" because ***litter*** was a sufficient governmental justification for the enactment of the ordinances in question[11]) (all emphasis added).

---

[9] *See, e.g.*, the earlier ruling of the Sixth Circuit in this case in *Deja Vu I*, 274 F.3d at 394 n.4 (appellate court coming up with its own justification for a license disclosure provision even though it did not comport with the "codified" reason for that requirement set forth in the challenged ordinance). *See also Mitchell v. Comm'n on Adult Entertainment Establishments of Delaware*, 10 F.3d 123, 136-37 (3rd Cir. 1993); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546, 560 (5th Cir. 2006); *DiMa Corp.*, 185 F.3d at 829-30; *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir. 1998); *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1284-285 (10th Cir. 2002), *cert. denied*, 537 U.S. 947 (2002); and *Jameson*, 2006 WL 3386489 at * 11.

In addition, even if the primary governmental interest was a purported concern of crime, the ruling of the Sixth Circuit is broad enough so that a municipality could refuse, in discovery, to provide ***raw crime data*** to a litigant looking to analyze the same in order to attempt to "cast doubt upon" the government's purported rationale for enacting a speech-restrictive law. That would, indeed, be ironic given the fact that of the thirty-nine areas of inquiry of the 30(b)(6) deposition notice at issue here, the *only* one where the Magistrate Judge permitted even limited discovery (No. 32) concerned crime data. App. 111, 124-25.

---

[10] *But cf.*, *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 374 (5th Cir. 1998) (Fifth Circuit concludes that there was no reason to believe that the consideration of certain secondary effects for the adoption of a zoning ordinance was relevant to the enactment of an anti-nudity provision).

[11] But decisions of this Court seem to cast doubt upon whether "litter" can be used as a basis to suppress expression. *See Schneider v. New Jersey*, 308 U.S. 147, 162 (1939); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-09 (1984); and *Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.7 (1989).

Without such information, it would be virtually impossible for a plaintiff to either demonstrate that "the municipality's evidence does not support its rationale" or to "furnish [ ] evidence that disputes the municipality's factual findings." *Alameda Books*, 535 U.S. at 438-39.

In such a circumstance, the claim of adverse secondary effects being the basis for the enactment of speech-restrictive laws becomes irrefutable, irrebuttable, and incontestable. That could not have been the intent behind this Court's rulings in *Pap's II* and *Alameda Books*, and this petition should therefore be granted to provide clarification on these issues.

## III. THE SIXTH CIRCUIT'S OPINION PERMITS THE GOVERNMENT TO WITHHOLD THE TRUTH AND TO ENACT SPEECH-RESTRICTIVE REGULATIONS BASED UPON FALSEHOODS AND "SHODDY DATA OR REASONING."

The Sixth Circuit's opinion subverts the rules of evidence, which are supposed to be applied "to the end that the truth may be ascertained and the proceedings justly determined." F.R.E. Rule 102. But even before that "no discovery" ruling, the lack of clarity of this Court's secondary effects doctrine was leading appellate courts to explicitly conclude that the *truth* simply does not matter in these type of challenges.[12] These ominous jurisprudential

---

[12] *See DiMa Corp.*, 185 F.3d at 831 ("*DiMa*'s contradictory evidence would be highly probative *if our task were to discover the objective truth about the effect of* [the plaintiff] *operating in Hallie. But our task under the First Amendment is far different")* (emphasis and clarification added). *See also Jameson*, 2006 WL 3386489, at *21 (". . .it is *irrelevant* whether the local government is *actually wrong* regarding the extent of

(Continued on following page)

developments permit the government to impermissibly suppress disfavored – but nevertheless protected – expression. This is because "adult" businesses do not necessarily engender "adverse secondary effects." Judicial decisions have reached this conclusion,[13] as have a number of recent peer-reviewed journal articles.[14]

Most telling in regard to this concern is the Eleventh Circuit decision in *Flanigan's Enterprises*, where a *police study* had concluded that there was no correlation between adult entertainment establishments and crime; a real estate analysis commissioned by adult businesses found no decrease in real estate values; and that latter finding was confirmed by the county's own real estate appraiser. 242 F.3d at 979-80. Based upon *that* evidence, the Eleventh Circuit declared that it was not reasonable for Fulton County to "rely on remote, foreign studies concerning secondary effects when the County's *own current, empirical data* conclusively demonstrated that such studies were

---

all the secondary effects that have actually occurred or may occur in the future") (emphasis added).

[13] *See, e.g.*, *Peek-A-Boo Lounge,* 337 F.3d at 1268; *Flanigan's Enterprises,* 242 F.3d at 986; and *Erie Boulevard Triangle Corp. v. City of Schenectady*, 250 F.Supp.2d 22, 32 (N.D.N.Y. 2003).

[14] *See, e.g.*, *An Examination of the Assumption That Adult Businesses Are Associated With Crime In Surrounding Areas: A Secondary Effects Study In Charlotte, North Carolina*, 38 Law & Society Review, No. 1 (2004); and Linz, *Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California*, 43 The Journal of Sex Research 182 (2006) (this publication even containing a methodological critique thereof and a response). *See also* Enriquez, *A Legal and Empirical Perspective of Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol'y & L. 1 (2006) (non-peer reviewed published study that found no connection between crime rates and live entertainment "adult" businesses).

not relevant to local conditions." *Id.* at 986 (emphasis added). However, given the Sixth Circuit's ruling at issue here, the Fulton County police study could have been "buried" by governmental officials, and the truth might never have seen the light of a federal courtroom.[15]

*Flanigan's Enterprises* is not the only case where discovery has disclosed governmental-held evidence demonstrating a lack of connection between "adult" businesses and secondary effects. In Lakewood, Washington, the city uncovered the "depressing statistic" that there was absolutely no demonstrated connection between crime rates and adult entertainment establishments. App. 451.[16] The city officials then conducted secret proceedings in an effort to "find" secondary effects, and subsequently enacted a comprehensive regulatory ordinance of adult businesses. Finding the conduct of the city to have been improper, the Ninth Circuit reversed a lower court decision dismissing a constitutional challenge against that ordinance. *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001).

---

[15] These concerns are not hypothetical. After losing its initial battle, Fulton County conducted a three-year police analysis of crime rates and adult businesses in order to justify a *new* ordinance, which similarly concluded that there was no connection. Yet, the county attempted to "hide" this report. In denying Fulton County's motion for summary judgment on *that* ordinance, the district court stated that it was "somewhat troubled by the fact that it appears that this report was withheld from the plaintiffs until less than one week prior to the date on which the vote on the ordinance was scheduled." App. 458. And, that report was ***not*** considered by the county board at the meeting during which the plaintiffs had an opportunity to present their arguments. *Id.* These circumstances are summarized in the subsequent opinion found at *Flanigan's Enter., Inc. v. Fulton County*, 2006 WL 2927532 (N.D. Ga. Oct. 12, 2006).

[16] Undated memorandum of David Bugher, Community Development Director for the City of Lakewood, Washington, to Daniel Held, City Attorney for the City of Lakewood, Washington, disclosed in discovery in the case of *Byran Clark v. City of Lakewood*, Case No. C98-5341 RJB (W.D. Wash.).

Another example illustrating how the lack of discovery can subvert the legal process is found in the case of *D. Russo, Inc. v. Township of Union, New Jersey*, Superior Court of New Jersey Law Divisions: Docket No. UNN-L-2313-06, where an ordinance preamble cited various secondary effects studies as the justification for the enactment of that law, but the legislative record *contained no such materials*. In an effort to then determine what the commissioners actually relied upon (in furtherance of *Renton*) to enact that ordinance, the trial court permitted limited discovery in that regard. App. 460-61.

Moreover, city council members are permitted to testify in *support* of the constitutionality of an ordinance. *See, e.g., R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 406 (7th Cir. 2004). Yet, under the Sixth Circuit's decision, those challenging the constitutionality of a regulation would be precluded from deposing those city council members prior to the time that they testify at trial.

The preclusion of a plaintiff being able to take discovery on this secondary effects issue also permits municipalities to enact speech-restrictive laws based upon "shoddy data or reasoning" in violation of *Alameda Books*. An example of this can be found in *H&A Land Corp. v. City of Kenndale, Texas*, 2005 WL 723690 (N.D. Tex. March 29, 2005), where the district court concluded that an informal survey of real-estate appraisers prepared by Kenndale's lawyer was "shoddy" – and could not therefore be used as the basis for the enactment of the regulation at issue – predicated upon the court's analysis of the legal counsel's answers to questions at deposition.[17] *Id.* at ** 6-7.

If plaintiffs can be precluded from undertaking discovery of the purported secondary effects justification for the enactment of a speech-related restriction, the government can rely upon any "shoddy data or reasoning" that it wants and no one will be able to prove otherwise. The writ should, therefore, be granted.

## IV. THIS COURT SHOULD PROTECT THE RIGHT OF A LITIGANT TO HAVE HIS OR HER CLAIMS DETERMINED ON THE MERITS.

The decision of the Sixth Circuit upholding the dismissal of Plaintiffs' claims violated their right to a trial on the merits and is in conflict with the decisions of this Court and at least one other circuit.

It is without question that a moving party is not required to bring forth all of its arguments and proofs at a preliminary injunction hearing. *See, e.g., Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("A party . . . *is not required to prove his case in full* at a preliminary injunction hearing. . . . [A] preliminary injunction is customarily granted on the basis of procedures that are less formal and *evidence that is less complete* than in a trial on the merits.") (emphasis added) (internal citations omitted). An exception occurs when the preliminary injunction hearing is combined with a trial on the merits pursuant to

---

[17] While the district court decision does not specifically state that the deficiencies of the study were uncovered upon examination of the deposition testimony of the municipality's legal counsel, the limine brief found at App. 469-76 demonstrates this.

Fed.R.Civ.P. Rule 65(a)(2). However, that exception did not occur in this case. Under the circumstances that occurred here, Plaintiffs were deprived of their right to a full trial on the merits of *all* of their claims.

In addition, the decision of the Sixth Circuit is in direct conflict with the Ninth Circuit's decision in *Baby Tam & Co. v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) ("*Baby Tam II*"). *Baby Tam II* and the present case share astoundingly similar substance and procedural history.[18] The critical difference appears when, in *Baby Tam II*, the Ninth Circuit axiomatically instructs: "By winning the [permanent injunction] on the first appeal, Baby Tam did not abandon its other constitutional objections to the facial validity of the municipal ordinance. The City is mistaken in supposing that those issues are no longer part of this case and no longer before us." *Id.* at 1114. Where the Ninth Circuit protects a plaintiff's due process rights, the challenged ruling of the Sixth Circuit does not.

Here, Plaintiffs were *never* permitted to litigate their claims concerning their "secondary effects" challenge, the discretionary nature of the Ordinance as demonstrated by administrative proceedings that occurred ***after*** the sole evidentiary hearing in this case, or the politically controlled Board so central to this licensing scheme (among others). In order to protect the fundamental right to a trial and to resolve this circuit conflict, this petition should be granted.

---

[18] In both challenges to "adult" business regulations, plaintiffs' motions for preliminary injunction ultimately resulted in the issuance of permanent injunctions. *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102-103 (9th Cir. 1998) ("*Baby Tam I*"); *Deja Vu I*, 274 F.3d at 403. Both circuits instructed the district courts to maintain the injunction until the constitutional deficiencies were corrected. *Baby Tam I*, 154 at 1102-103; *Deja Vu I*, 274 F.3d at 403. Both injunctions were dissolved after the municipality purportedly corrected the ordinances' constitutional deficiencies identified in the injunction. *Baby Tam II*, 199 F.3d at 1114; *Deja Vu II*, 466 F.3d at 395.

◆

## CONCLUSION

For the reasons set forth above, Plaintiffs/Petitioners respectfully request this Honorable Court grant the petition for a writ of certiorari.

Dated: January 31, 2007.

Respectfully submitted,

BRADLEY J. SHAFER
(*Counsel of Record*)
ANDREA E. PRITZLAFF
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
517-886-6560
*Counsels for Petitioners*

MICHAEL F. PLEASANTS
PLEASANTS LAW FIRM
8 South Third, Suite 200
Memphis, Tennessee 38103
901-572-7332
*Co-Counsel for Petitioners*

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI*

### Volume I

Page

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, 466 F.3d 391 (6th Cir. 2006); Amended Opinion and Judgment, Filed October 12, 2006 .......... App. 1

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States Court of Appeals for the Sixth Circuit, Case No. 05-5895, Opinion, Filed June 22, 2006 .......... App. 16

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001), Opinion, Filed December 6, 2001 ... App. 30

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Memorandum and Order granting motion for preliminary injunction, Filed December 8, 1997 .......... App. 78

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Case Management Order, Filed March 5, 1998 .......... App. 99

---

* Any typographical and/or incorrect punctuation found in the following pages were intentionally left to show accurately how the original documents appeared.

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order regarding Case Management Order, Filed March 6, 1998 ........... App. 105

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order regarding discovery deadlines, Filed September 16 1998 ............. App. 108

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order and Memorandum regarding motion for protective order, Filed October 22, 1998 .................................................. App. 111

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order regarding deadlines, Filed October 30, 1998 .............................. App. 128

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Memorandum and Order dissolving preliminary injunction, Filed December 3, 1998 ................................................ App. 131

INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Memorandum and Order granting second motion for preliminary injunction, Filed October 4, 1999 .......................... App. 149

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order converting preliminary injunction into permanent injunction, Filed December 23, 1999 .......................... App. 202

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order denying motion to vacate or dissolve the injunction, Filed May 26, 2000 .......................... App. 204

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order granting motion for oral argument, Filed April 4, 2005 .......................... App. 205

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order granting motion for leave to file a reply, Filed April 5, 2005 .......................... App. 206

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order and Memorandum granting motion to dissolve, Filed April 27, 2005 ........ App. 207

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States Court of Appeals for the Sixth Circuit, Case No. 05-5895, Order denying petition for rehearing, Filed November 3, 2006 ........ App. 217

Volume II

The First Amendment to the United States Constitution ........ App. 218

The Fourteenth Amendment to the United States Constitution ........ App. 219

42 United States Code Annotated §1983 – Civil Action for Deprivation of Rights ........ App. 221

Tennessee Code Annotated §27-9-111 (1998) ........ App. 222

Tennessee Code Annotated §27-9-111 (2002) – With Historical and Statutory Notes ........ App. 224

Metropolitan Government of Nashville and Davidson County Bill No. 097-796 (Original Bill), Approved August 25, 1997 ........ App. 226

Recodified Version of Chapter 6.54 ........ App. 292

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

Excerpts of Verified Complaint for Preliminary Injunction, Permanent Injunction, and Declaratory Judgment, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed October 17, 1997 .............................. App. 352

Excerpt of Transcript of Proceedings for hearing on January 27, 1999, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed January 27, 1999 ..................... App. 356

Table of Contents of Brief in Support of Plaintiffs' Second Motion for Preliminary Injunction, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066 ............... App. 366

Notice of Depositions of Representatives of the Metropolitan Government of Nashville and Davidson County, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Dated August 28, 1998 ...................... App. 374

Request for Production of Documents by Plaintiffs to Defendants, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed April 24, 1998 .................................. App. 382

Excerpts of Transcript of April 27, 1999 Metropolitan Adult Entertainment Board Hearing........... App. 390

Excerpt of Transcript of Proceedings for Preliminary Injunction hearing on April 15, 1999, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed April 15, 1999 ..................................................... App. 402

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

Excerpts of Transcript of May 11, 1999 Metropolitan Adult Entertainment Board Hearing ........... App. 410

Excerpts of Transcript of May 25, 1999 Metropolitan Adult Entertainment Board Hearing ........... App. 413

Metropolitan Sexually Oriented Business Licensing Board Letter Regarding Denial of Deja Vu of Nashville's License Application, dated May 26, 1999 ........... App. 420

Excerpt of Transcript of Proceedings for Case Management Conference on December 21, 1999, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed January 14, 2000 ........... App. 422

Notice of Deposition of Representatives of the City of Milford, Connecticut, *Sidepockets, Inc. v. City ofMilford, Connecticut*, United States District Court for the District of Connecticut, Case No. 3:03-cv-02134-AWT, Filed February 17, 2005 .... App. 438

Excerpt of Transcript of Telephonic Status Conference, *Sidepockets, Inc. v. City of Milford, Connecticut*, United States District Court for the District of Connecticut, Case No. 3:03-cv-02134-AWT, Filed October 30, 2006 ........... App. 444

Order re motion for clarification, *Sidepockets, Inc. v. City of Milford, Connecticut*, United States District Court for the District of Connecticut, Case No. 3:03-cv-02134-AWT, Filed October 30, 2006 ........... App. 449

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

Memorandum of David Bugher Community Development Director for the City of Lakewood, Washington, to Daniel Held, City Attorney for the City of Lakewood, Washington, *Byran Clark v. City of Lakewood*, Case No. C98-5341 RJB (W.D. Wash.) .......... App. 451

Order regarding motion for summary judgment, *Flanigan's Enterprises, Inc., et al. v. Fulton County*, United States District Court for the Northern District of Georgia, Case No. 1:01-CV-3109-RLV, Filed April 7, 2004 .......... App. 452

Order regarding discovery, *D. Russo, Inc. v. Township of Union, New Jersey*, Superior Court of New Jersey Law Division: Union County, Docket No. UNN-L-2313-06, Filed September 19, 2006 .......... App. 460

Order regarding motion for protective order, *High Five Investments, LLC v. Floyd County*, United States District Court for the Northern District of Georgia, Case No. 4:06-CV-0190-HLM, Filed January 10, 2007 .......... App. 463

Plaintiff-Intervenor Reliable Consultants, Inc. d/b/a Dreamer's' Brief in Support of Motion in Limine, *Reliable Consultants, Inc. v. City of Kennedale*, United States District Court for the Northern District of Texas, Case No. 4:02-CV-0458-Y, Filed June 18, 2004 .......... App. 469

466 F.3d 391

## UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

---

| | |
|---|---|
| Deja Vu of Nashville, Inc., *et al.*,<br>*Plaintiffs-Appellants,*<br>*v.*<br>Metropolitan Government of Nashville & Davidson County,<br>*Defendant-Appellee.* | No. 05-5895 |

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
Nos. 97-01066; 97-01176 –
Todd J. Campbell, District Judge.

Argued: June 6, 2006

Decided and Filed: October 12, 2006

Before: MARTIN, MOORE, and ROGERS, Circuit Judges.

---

## COUNSEL

**ARGUED:** Bradley J. Shafer, SHAFER & ASSOCIATES, Lansing, Michigan, for Appellants. Francis H. Young, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellee. **ON BRIEF:** Bradley J. Shafer, Andrea E. Pritzlaff, SHAFER & ASSOCIATES, Lansing, Michigan, Michael F. Pleasants, Memphis, Tennessee, for Appellants. Francis H. Young, James L. Charles, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellee.

---

## AMENDED OPINION

---

BOYCE F. MARTIN, JR., Circuit Judge. This case has been before this Court several times. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377 (6th Cir. 2001) [hereinafter *Deja Vu I*]. Last time it was here, the Court remarked that "'deja vu' provides a particularly appropriate label for this second appeal." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 421 F.3d 417, 418 (6th Cir. 2005) [hereinafter *Deja Vu II*]. This time, it's "like deja vu all over again." YOGI BERRA, *available at* http://www.quotationspage.com/quote/27218.html (last accessed June 20, 2006); *see also* JOHN FOGERTY, *Deja Vu (All Over Again), on* DEJA VU ALL OVER AGAIN (Geffen Records 2004). Before us now is Deja Vu's appeal from the district court's decision dissolving a permanent injunction which had enjoined the enforcement of Metropolitan Code of Laws Chapter 6.54 "Sexually Oriented Businesses" ("the Ordinance"), and dismissing the case. The issue on appeal is whether it was proper for the district court to have done so. We AFFIRM.

### I.

There is quite a history to this case. It has been described extensively in this Court's previous opinions, *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377 (6th Cir. 2001) [hereinafter *Deja Vu I*], and *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 421 F.3d 417, 418 (6th Cir. 2005) [hereinafter *Deja Vu II*]. In short, the Metro Nashville government enacted Chapter 6.54 on August 19, 1997. It required "sexually oriented" businesses to obtain licenses and performers to obtain permits. Deja Vu sought to enjoin the Ordinance by arguing that it was unconstitutional for not providing prompt judicial review. The district court agreed, and on December 8, 1997, entered a preliminary injunction. The government amended the Ordinance and, approximately one year later, the injunction was dissolved. In response, on December 17, 1998, Deja Vu filed a second motion for a preliminary injunction. The government responded by notifying the court of ninety-two amendments to the Ordinance since it was enacted. The district court granted Deja Vu's motion on October 4, 1999, enjoining enforcement of the Ordinance in its entirety. Shortly thereafter, following a hearing on December 21, 1999, the preliminary injunction was converted into a permanent injunction.

The government amended the Ordinance and at the same time appealed to this Court. In *Deja Vu I,* this Court affirmed the district court's decision enjoining enforcement of the amended Ordinance, holding that the judicial review provision, *i.e.,* Tennessee's common law writ of certiorari, was constitutionally inadequate and that the statutory definition of "sexually oriented" was overly broad. The Supreme Court denied certiorari, 535 U.S. 1073, at which time additional amendments of the Ordinance went into effect. The amendments narrowed the definition of "sexually oriented," and the State altered the common law writ to require prompt judicial review in First Amendment cases. On February 23, 2005, the government filed a motion to dissolve the permanent injunction. The government argued that the Ordinance is now constitutional under *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.,* 541 U.S. 774 (2004), and complied with *Deja Vu I. See Deja Vu I,* 274 F.3d at 403 ("Upon remand, the district court should maintain the injunction until Metropolitan

Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected."). The district court agreed with the government and entered an Order dissolving the injunction on April 29, 2005. The court found that the amended definition of "sexually oriented" "is not overbroad and complies with the First Amendment."[1] Further, the court found that the judicial review provision "does guarantee prompt judicial review as required by the First Amendment," and "Metro has satisfied this Court that the constitutional problems with its judicial review procedures have been corrected."[2] The district court further concluded that the previous injunction hearing had been consolidated with a trial on the merits, and therefore further litigation, if it were to occur, would need to be the result of the filing of a new case by Deja Vu. Nine days prior to the district court's decision dissolving the injunction, this Court heard oral argument in *Deja Vu II,* which involved the district court's award of attorney fees to Deja Vu. This is how it stood when this Court affirmed the district court's award of $536,535.22 in attorney fees in *Deja Vu II.* The appeal from the district court's order dissolving the permanent injunction is now before this Court. Deja Vu essentially makes two arguments. First, it argues that the district court improperly dissolved the injunction by not analyzing the issue under Federal Rule of Civil Procedure 60(b). Second, Deja Vu argues that the district court improperly dismissed the case because Deja Vu never received a trial on its claims.

---

[1] The Ordinance now defines "sexually oriented" as follows:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Metro Code of Laws § 6.54.010(Y).

[2] The relevant statute now provides:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e).

## II.

### A. *Dissolution of the Injunction*

"A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Women's Medical Professional Corp. v. Baird,* 438 F.3d 595, 602 (6th Cir. 2006) (quoting *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir. 1998)). In evaluating a district court's grant of a permanent injunction or dissolution of a permanent injunction previously granted, we review its factual findings for clear error and its legal conclusions de novo. *Id.* The scope of injunctive relief is reviewed under an abuse of discretion standard. *Id.*

Even before the Federal Rules of Civil Procedure were enacted, the prospective features of injunctions were subject to modification by the district court. *United States* *v. Swift & Co.,* 286 U.S. 106, 114 (1932) (noting that "a continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need"). Now that the Rules have been enacted, modifications or dissolution of injunctions must take place under Rule 60(b). *Rufo v. Inmates of Suffolk Jail,* 502 U.S. 367, 380 (1992) (noting that "the prospective effect of such a judgment or decree will be open to modification where deemed equitable under Rule 60(b)"). In *Rufo,* the Court held that "Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.*

Thus, "if a party seeks to have a decree set aside entirely, he or she has to show that the decree has served its purpose, and there is no longer any need for the injunction." MOORE'S FED. PRACTICE § 60.47[2][c] (3d ed. 2005); *see also Board of Education of Oklahoma City v. Dowell,* 498 U.S. 237, 247 (1991) (without referencing Rule 60(b)(5), holding that the desegregation decree should be dissolved when "the purposes of the desegregation litigation had been fully achieved"); *Nicacio v. INS,* 797 F.2d 700, 706 (9th Cir. 1985) ("[A] court which issues an injunction retains jurisdiction to modify the terms of the injunction if a change in circumstances so requires."). In *Sweeton v. Brown,* 27 F.3d 1162 (6th Cir. 1994) (en banc), this Court described a "flexible standard" having "ancient lineage in our common law," and stated that Sir Francis Bacon's "principles generally provide that a court has continuing jurisdiction to terminate or modify an injunction and that an equitable remedy should be enforced only as long as the equities of the case require." *Id.* at 1164. In ordering the injunctions dissolved, we focused on the fact that "[t]he foundation upon which the claim for injunctive relief was built has crumbled," and concluded that "[n]o basis in federal law exists for the injunctive relief imposed in this case." *Id.* We then stated:

> Injunctions are one of the law's most powerful weapons. Ongoing injunctions should be dissolved when they no longer meet the requirements of equity. The law changes and clarifies itself over time. Neither the doctrines of *res judicata* or waiver nor a proper respect for previously entered judgments requires that old injunctions remain in effect when the old law on which they were based has changed.

*Id.* at 1166-67.

Consistent with these standards, in *Deja Vu I,* this Court stated that "[u]pon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected." 274 F.3d at 403. Following the government's motion to dissolve the injunction, the district court held that the constitutional problems with the Ordinance had been rectified.[3] We agree.

---

[3] It is unclear to us why the district court stated that this Court's dictate to maintain the injunction until the constitutional problems were resolved, "makes Plaintiffs' Rule 60 argument meritless." It appears that the district court then essentially applied the standards from Rule 60(b)(5) – which is what this court's "dictate" instructed the

(Continued on following page)

### *1. Prompt Judicial Review*

The Tennessee statute that modified the discretionary common law writ of certiorari now states:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e). Following the Supreme Court's decision in *Z.J. Gifts,* the judicial review statute clearly complies with the First Amendment's requirement of a prompt judicial decision. In *Z.J. Gifts,* the Supreme Court found that "Colorado's ordinary 'judicial review' rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming." 541 U.S. at 781 (emphases in original); *see also id.* at 782 ("[O]rdinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm."). Thus, "the First Amendment does not require special 'adult business' judicial review rules." *Id.* This holding, of course, applies where an ordinance "does not seek to

---

district court to do. The district court's statement notwithstanding, it properly went on to conclude that maintenance of the injunction should no longer have prospective application, which is consistent with Rule 60(b)(5).

*censor* material," but rather is a licensing scheme that "applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display." *Id.* at 783; *see also Deja Vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees,* 411 F.3d 777, 787-88 (6th Cir. 2005) (en banc). The licensing and permit criteria, M.C.L. § 6.54.050, 6.54.080, are reasonably objective, nondiscretionary criteria, such that the more relaxed standard of *Z.J. Gifts* would apply as opposed to the more stringent standard from *Freedman v. Maryland,* 380 U.S. 51 (1965). *See Deja Vu of Cincinnati,* 411 F.3d at 787 (noting that the Court in *Freedman* was confronted with a statute employing subjective standards where a denial of a license would likely result in complete censorship and concluding that *Freedman's* "special judicial review rules" do not apply to adult business licensing schemes).[4] Thus, pursuant to this standard, the government's expedited review provision complies with the First Amendment.

### 2. *Definition of "Sexually Oriented"*

In *Deja Vu I,* we held that the Ordinance's definition of "sexually oriented" was unconstitutionally overbroad. 274 F.3d at 387. "A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." *Id.* (quoting *New York v. Ferber,* 458 U.S. 747, 771 (1982)). As this Court has noted, the doctrine is designed "to prevent the chilling of future protected expression." *Id.* (citation omitted).

---

[4] Even if we were to conclude that *Freedman* still applied to Metro Nashville's Ordinance, the Ordinance is still constitutional. Here, there are "special judicial review" rules with respect to First Amendment cases that will guarantee a prompt judicial decision. Thus, the Ordinance passes constitutional muster under both *Z.J. Gifts* and *Freedman.*

The definition reviewed in *Deja Vu I* defined "sexually oriented" as "any exhibition of any motion pictures, films, or videos depicting 'specified sexual activities' or 'specified anatomical areas.'" M.C.L. § 6.54.070(Y) (1999) (amended). "'Specified anatomical areas'" included '[l]ess than completely and opaquely covered' buttocks and female breasts." *Deja Vu I,* 274 F.3d at 377 (quoting M.C.L. § 6.54.010(BB)). Based on these definitions, this Court concluded that "any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is a 'sexually oriented' film under the Ordinance, irrespective of whether the film's content constitutes 'adult entertainment' or causes the type of secondary effects . . . that Metropolitan Nashville seeks to regulate." *Id.* at 377-78. Thus, "[b]ecause this definition could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent, it is overbroad." *Id.* at 388.

Since this Court's ruling in *Deja Vu I,* the definition of "sexually oriented" has been amended and is now considerably narrower. It now reads:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities or

> specified anatomical areas"[5] offered for observation by the patron(s) on the premises of a sexually oriented business.

Metro Code of Laws § 6.54.010(Y).

The definition of "sexually oriented business," which was not found to be constitutionally infirm in *Deja Vu I,* states: "Any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as defined in this section for observations by patrons therein." M.C.L. § 6.54.010(Z). In *Deja Vu I,* we noted that if this definition stood alone, it would be overbroad, as it would include a hotel that offers its guests access to an adult cable channel, but found that the Ordinance avoided this problem by having four additional subsections, one of which must be satisfied, in order to fall within the Ordinance. These four subsections define "sexually oriented bookstore," "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented video store." M.C.L. § 6.54.010(Z)(1)-(4). Thus, we held that the requirement of being a "sexually oriented business" "narrows the Ordinance's application to those theaters that regularly present material distinguished or characterized by an emphasis on sex acts or particular body parts. Again, reading the definitions together saves the parts from overbreadth." *Deja Vu I,* 274 F.3d at 388.

---

[5] The definition of "specified sexual activities" includes sexual intercourse and fondling of buttocks or breast. *See* M.C.L. § 5.43.010(CC).

The government took its cue from this decision by narrowing its definition of "sexually oriented" to require that the activities be "offered for observation by the patron(s) on the premises of a sexually oriented business." M.C.L. § 6.54.010(Y). The definition was also narrowed such that it no longer applies to "*any* exhibition of *any* motion pictures, films, or videos depicting 'specified sexual activities' or 'specified anatomical areas'" M.C.L. § 6.54.010(Y) (1999) (amended) (emphases added), but rather, now applies only to those that "regularly depict material which is distinguished or characterized by an emphasis on matter depicting or describing 'specified sexual activities or specified anatomical areas.'" M.C.L. § 6.54.010(Y). The district court found that these two amendments cured the constitutional infirmities. We agree. None of this Court's concerns from *Deja Vu I* remain under the current definition. The definition means that only those activities that regularly depict specified sexual activities or anatomical areas and that occur on the premises of a sexually oriented business will be regulated. Our previous concerns involving, as an example, a hotel that offers its guests an adult cable channel, no longer remain under this narrowed language. Moreover, Deja Vu did not discuss overbreadth in its final brief or reply brief or allege that the definition was still unconstitutional.

### *B. Dismissal of the Case*

Deja Vu also argues that it was improper for the district court to dismiss the case because Deja Vu never received a trial on the merits of its constitutional challenges. In 1999, however, the district court entered a permanent injunction following a hearing on December 21. Unless disputed questions of material fact exist, no trial or evidentiary hearing is necessary for the district court to enter a permanent injunction. *United States v. McGee,* 714 F.2d 607, 613 (6th Cir. 1983).

The district court's memorandum and analysis with regard to Deja Vu's motion for a preliminary injunction was incorporated into the district court's order making the preliminary injunction permanent. In that memorandum, the district court addressed what appears to be all of Deja Vu's challenges to the Ordinance, leaving no unresolved issues of fact that would necessitate a trial. Deja Vu disagrees, arguing that it was not able to litigate its "secondary effects" challenge because the district court never addressed its motion seeking review of a magistrate judge's decision to enter a protective order that insulated Metro from discovery regarding secondary effects.

From the record, it appears that Deja Vu is correct that the district court never explicitly addressed its motion, which apparently slipped through the cracks as the district court's different judges resolved different motions for injunctions addressing different iterations of the Ordinance. Nonetheless, this oversight is immaterial for two reasons. First, the district court's memorandum granting Deja Vu's preliminary injunction concluded that Metro enacted the ordinance "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County," which effectively mooted Deja Vu's discovery motion. Second, and more fundamentally, Deja Vu is not entitled to discovery regarding secondary effects. We have followed the Supreme Court in deferring to local governments' conclusions regarding whether and how their ordinances address adverse secondary effects of adult-oriented establishments. It is clear, for instance, that a local government does not need localized proof of adverse secondary effects in order to regulate adult establishments. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 (6th Cir. 1997) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582-84 (1991) (Souter, J., concurring in the judgment)). Similarly, all that is needed to justify a regulation is a reasonable belief that it will help ameliorate such secondary effects. *Deja Vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees*, 411 F.3d 777, 790 (6th Cir. 2005) (en banc) (quoting *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998)). Deja Vu offers no authority entitling it to undermine this deference through discovery.

## III.

For the foregoing reasons, we AFFIRM the district court's order dissolving the permanent injunction and dismissing the case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-5895

DEJA VU OF NASHVILLE, INC., *et al.*

Plaintiffs-Appellants,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TENNESSEE,

Defendants-Appellee.

Before: MARTIN, MOORE, and ROGERS, Circuit Judges.

## JUDGMENT

(Filed Oct. 12, 2006)

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's order dissolving the permanent injunction which had enjoined the enforcement of Metropolitan Code of Laws Chapter 6.54 "Sexually Oriented Businesses" and dismissing the case is AFFIRMED.

**ENTERED BY ORDER
OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

2006 WL 1716720

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

No. 05-5895

**UNITED STATES COURT OF APPEALS,**
FOR THE SIXTH CIRCUIT.

DEJA VU OF NASHVILLE,
INC., *et al.*,

Plaintiffs-Appellants,

v.

METROPOLITAN
GOVERNMENT OF
NASHVILLE & DAVIDSON
COUNTY,

Defendant-Appellee. /

ON APPEAL FROM THE
UNITED STATES
DISTRICT COURT FOR
THE MIDDLE DISTRICT
OF TENNESSEE

(Filed June 22, 2006)

Before: MARTIN, MOORE, and ROGERS, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. This case has been before this Court several times. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377 (6th Cir. 2001) [hereinafter *Deja Vu I*]. Last time it was here, the Court remarked that " 'deja vu' provides a particularly appropriate label for this second appeal." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 421 F.3d 417, 418 (6th Cir. 2005) [hereinafter *Deja Vu II*]. This time, it's "like deja vu all over again." YOGI BERRA, *available at* http://www.quotationspage.com/quote/27218.html (last accessed June 20, 2006); *see also* JOHN FOGERTY, *Deja Vu (All Over Again), on* DEJA VU ALL OVER AGAIN (Geffen Records 2004). Before us now is Deja Vu's appeal from the district court's decision dissolving a permanent injunction which had enjoined the enforcement of Metropolitan Code of Laws Chapter 6.54 "Sexually Oriented Businesses" ("the Ordinance"), and dismissing the case. The issue on appeal is whether it was proper for the district court to have done so. We AFFIRM.

## I.

There is quite a history to this case. It has been described extensively in this Court's previous opinions, *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377 (6th Cir. 2001) [hereinafter *Deja Vu I*], and *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 421 F.3d 417, 418 (6th Cir. 2005) [hereinafter *Deja Vu II*]. In short, the Metro Nashville government enacted Chapter 6.54 on August 19, 1997. It required "sexually oriented" businesses to obtain licenses and performers to obtain permits. Deja Vu sought to enjoin the Ordinance by arguing that it was unconstitutional for not providing prompt judicial review. The district court agreed, and on December 8, 1997, entered a preliminary injunction. The government amended the Ordinance and, approximately one year later, the injunction was dissolved. In response, on December 17, 1998, Deja Vu filed a second motion for a preliminary injunction. The government responded by notifying the court of ninety-two amendments to the Ordinance since it was enacted. The district court granted Deja Vu's motion on October 4, 1999, enjoining enforcement of the Ordinance in its entirety. Shortly thereafter, following a hearing on December 21, 1999, the preliminary injunction was converted into a permanent injunction.

The government amended the Ordinance and at the same time appealed to this Court. In *Deja Vu I*, this Court affirmed the district court's decision enjoining enforcement of the amended Ordinance, holding that the judicial review provision, *i.e.*, Tennessee's common law writ of certiorari, was constitutionally inadequate and that the statutory definition of "sexually oriented" was overly broad. The Supreme Court denied certiorari, 535 U.S. 1073, at which time additional amendments of the Ordinance went into effect. The amendments narrowed the definition of "sexually oriented," and the State altered the common law writ to require prompt judicial review in First Amendment cases. On February 23, 2005, the government filed a motion to dissolve the permanent injunction. The government argued that the Ordinance is now constitutional under *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), and complied with *Deja Vu I*. *See Deja Vu I*, 274 F.3d at 403 ("Upon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected."). The district court agreed with the government and entered an Order dissolving the injunction on April 29, 2005. The court found that the amended definition of "sexually oriented" "is not overbroad and complies with the First Amendment."[1] Further, the court found that the judicial

---

[1] The Ordinance now defines "sexually oriented" as follows:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an

(Continued on following page)

review provision "does guarantee prompt judicial review as required by the First Amendment," and "Metro has satisfied this Court that the constitutional problems with its judicial review procedures have been corrected."[2] The district court further concluded that the previous injunction hearing had been consolidated with a trial on the merits, and therefore further litigation, if it were to occur, would need to be the result of the filing of a new case by Deja Vu. Nine days prior to the district court's decision dissolving the injunction, this Court heard oral argument in *Deja Vu II*, which involved the district court's award of attorney fees to Deja Vu. This is how it stood when this Court affirmed the district court's award of $536,535.22 in attorney fees in *Deja Vu II*. The appeal from the district court's order dissolving the permanent injunction is now before this Court. Deja Vu essentially makes two arguments. First, it argues that the district court improperly dissolved the injunction by not analyzing the issue under Federal Rule of Civil Procedure 60(b). Second, Deja Vu

---

> emphasis on matter depicting or describing "specified sexual activities or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Metro Code of Laws § 6.54.010(Y).

[2] The relevant statute now provides:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e).

argues that the district court improperly dismissed the case because Deja Vu never received a trial on its claims.

## II.

### *A. Dissolution of the Injunction*

"A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006) (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998)). In evaluating a district court's grant of a permanent injunction or dissolution of a permanent injunction previously granted, we review its factual findings for clear error and its legal conclusions de novo. *Id.* The scope of injunctive relief is reviewed under an abuse of discretion standard. *Id.*

Even before the Federal Rules of Civil Procedure were enacted, the prospective features of injunctions were subject to modification by the district court. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (noting that "a continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need"). Now that the Rules have been enacted, modifications or dissolution of injunctions must take place under Rule 60(b). *Rufo v. Inmates of Suffolk Jail*, 502 U.S. 367, 380 (1992) (noting that "the prospective effect of such a judgment or decree will be open to modification where deemed equitable under Rule 60(b)"). In *Rufo*, the Court held that "Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.*

Thus, "if a party seeks to have a decree set aside entirely, he or she has to show that the decree has served its purpose, and there is no longer any need for the injunction." MOORE'S FED. PRACTICE § 60.47[2][c] (3d ed.2005); *see also Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237, 247 (1991) (without referencing Rule 60(b)(5), holding that the desegregation decree should be dissolved when "the purposes of the desegregation litigation had been fully achieved"); *Nicacio v. INS*, 797 F.2d 700, 706 (9th Cir. 1985) ("[A] court which issues an injunction retains jurisdiction to modify the terms of the injunction if a change in circumstances so requires."). In *Sweeton v. Brown*, 27 F.3d 1162 (6th Cir. 1994) (en banc), this Court described a "flexible standard" having "ancient lineage in our common law," and stated that Sir Francis Bacon's "principles generally provide that a court has continuing jurisdiction to terminate or modify an injunction and that an equitable remedy should be enforced only as long as the equities of the case require." *Id.* at 1164. In ordering the injunctions dissolved, we focused on the fact that "[t]he foundation upon which the claim for injunctive relief was built has crumbled," and concluded that "[n]o basis in federal law exists for the injunctive relief imposed in this case." *Id.* We then stated:

> Injunctions are one of the law's most powerful weapons. Ongoing injunctions should be dissolved when they no longer meet the requirements of equity. The law changes and clarifies

> itself over time. Neither the doctrines of *res judicata* or waiver nor a proper respect for previously entered judgments requires that old injunctions remain in effect when the old law on which they were based has changed.

*Id.* at 1166-67.

Consistent with these standards, in *Deja Vu I*, this Court stated that "[u]pon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected." 274 F.3d at 403. Following the government's motion to dissolve the injunction, the district court held that the constitutional problems with the Ordinance had been rectified.[3] We agree.

### 1. *Prompt Judicial Review*

The Tennessee statute that modified the discretionary common law writ of certiorari now states:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the

---

[3] It is unclear to us why the district court stated that this Court's dictate to maintain the injunction until the constitutional problems were resolved, "makes Plaintiffs' Rule 60 argument meritless." It appears that the district court then essentially applied the standards from Rule 60(b)(5) – which is what this court's "dictate" instructed the district court to do. The district court's statement notwithstanding, it properly went on to conclude that maintenance of the injunction should no longer have prospective application, which is consistent with Rule 60(b)(5).

> United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e). Following the Supreme Court's decision in *Z.J. Gifts*, the judicial review statute clearly complies with the First Amendment's requirement of a prompt judicial decision. In *Z.J. Gifts*, the Supreme Court found that "Colorado's ordinary 'judicial review' rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming." 541 U.S. at 781 (emphases in original); *see also id.* at 782 ("[O]rdinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm."). Thus, "the First Amendment does not require special 'adult business' judicial review rules." *Id.* This holding, of course, applies where an ordinance "does not seek to *censor* material," but rather is a licensing scheme that "applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display." *Id.* at 783; *see also Deja Vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees*, 411 F.3d 777, 787-88 (6th Cir. 2005) (en banc). The licensing and permit criteria, M.C.L. § 6.54.050, 6.54.080, are reasonably objective, nondiscretionary criteria, such that the more relaxed standard of *Z.J. Gifts* would apply as opposed to the more stringent standard from *Freedman v. Maryland*, 380 U.S. 51 (1965). *See Deja Vu of Cincinnati*, 411 F.3d at 787 (noting that the Court in *Freedman* was confronted with a statute employing subjective standards where a denial of a license would likely result in complete censorship and concluding that *Freedman's* "special judicial review rules" do not apply to adult business licensing schemes).[4] Thus, pursuant to this standard, the government's expedited review provision complies with the First Amendment.

### 2. *Definition of "Sexually Oriented"*

In *Deja Vu I*, we held that the Ordinance's definition of "sexually oriented" was unconstitutionally overbroad. 274 F.3d at 387. "A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." *Id.* (quoting *New York v. Ferber*, 458 U.S. 747, 771 (1982)). As this Court has noted, the doctrine is designed "to prevent the chilling of future protected expression." *Id.* (citation omitted).

The definition reviewed in *Deja Vu I* defined "sexually oriented" as "any exhibition of any motion pictures, films, or videos depicting 'specified sexual activities' or 'specified anatomical areas.'" M.C.L. § 6.54.070(Y) (1999) (amended). "'Specified anatomical areas'" included '[l]ess than completely and opaquely covered' buttocks and female breasts." *Deja Vu I*, 274 F.3d at 377 (quoting M.C.L. § 6.54.010(BB)). Based on these definitions, this Court concluded that "any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is a 'sexually oriented' film under the Ordinance, irrespective of whether the film's content constitutes 'adult entertainment' or causes the type of secondary effects . . . that Metropolitan Nashville seeks to regulate." *Id.* at 377-78. Thus, "[b]ecause this definition could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent, it is overbroad." *Id.* at 388.

---

[4] Even if we were to conclude that *Freedman* still applied to Metro Nashville's Ordinance, the Ordinance is still constitutional. Here, there are "special judicial review" rules with respect to First Amendment cases that will guarantee a prompt judicial decision. Thus, the Ordinance passes constitutional muster under both *Z.J Gifts* and *Freedman*.

Since this Court's ruling in *Deja Vu I*, the definition of "sexually oriented" has been amended and is now considerably narrower. It now reads:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities or specified anatomical areas"[5] offered for observation by the patron(s) on the premises of a sexually oriented business.

Metro Code of Laws § 6.54.010(Y).

The definition of "sexually oriented business," which was not found to be constitutionally infirm in *Deja Vu I*, states: "Any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as defined in this section for observations by patrons therein." M.C.L. § 6.54.010(Z). In *Deja Vu I*, we noted that if this definition stood alone, it would be overbroad, as it would include a hotel that offers its guests access to an adult cable channel, but found that the Ordinance avoided this problem by having four additional subsections, one of which must be satisfied, in order to fall within the Ordinance. These four subsections define "sexually oriented bookstore," "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented video store." M.C.L. § 6.54.010(Z)(1)-(4). Thus, we held that the requirement of being a "sexually oriented business" "narrows the Ordinance's application to those theaters that regularly present material distinguished or characterized by an emphasis on sex acts or particular body parts. Again, reading the definitions together saves the parts from overbreadth." *Deja Vu I*, 274 F.3d at 388.

---

[5] The definition of "specified sexual activities" includes sexual intercourse and fondling of buttocks or breast. *See* M.C.L. § 5.43.010(CC).

The government took its cue from this decision by narrowing its definition of "sexually oriented" to require that the activities be "offered for observation by the patron(s) on the premises of a sexually oriented business." M.C.L. § 6.54.010(Y). The definition was also narrowed such that it no longer applies to "*any* exhibition of *any* motion pictures, films, or videos depicting 'specified sexual activities' or 'specified anatomical areas'" M.C.L. § 6.54.010(Y) (1999) (amended) (emphases added), but rather, now applies only to those that "regularly depict material which is distinguished or characterized by an emphasis on matter depicting or describing 'specified sexual activities or specified anatomical areas.'" M.C.L. § 6.54.010(Y). The district court found that these two amendments cured the constitutional infirmities. We agree. None of this Court's concerns from *Deja Vu I* remain under the current definition. The definition means that only those activities that regularly depict specified sexual activities or anatomical areas and that occur on the premises of a sexually oriented business will be regulated. Our previous concerns involving, as an example, a hotel that offers its guests an adult cable channel, no longer remain under this narrowed language. Moreover, Deja Vu did not discuss overbreadth in its final brief or reply brief or allege that the definition was still unconstitutional.

### *B. Dismissal of the Case*

Deja Vu also argues that it was improper for the district court to dismiss the case because Deja Vu never received a trial on the merits of its constitutional challenges. In 1999, however, the district court entered a permanent injunction following a hearing on December 21. A permanent injunction is granted only after a trial on the merits. MOORE'S FED. PRACTICE § 65.05 (3d ed. 2005); *see also Kallstrom*, 136 F.3d at 1067 ("Where the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to permanent injunctive relief upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law."); *see also Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987) (to justify permanent injunctive relief, plaintiff must show actual success on the merits); *Peabody Holding Co. v. Costain Group, PLC*, 813 F.Supp. 1402, 1414 (E.D. Mo. 1993) ("The standard for determining whether a permanent injunction should issue is essentially the same as the standard for a preliminary injunction, except that the court determines the plaintiff's success on the merits rather than the plaintiff's likelihood of success on the merits.").

The district court's memorandum and analysis with regard to Deja Vu's motion for a preliminary injunction was incorporated into the district court's order making the preliminary injunction permanent. In that memorandum, the district court addressed what appears to be all of Deja Vu's challenges to the Ordinance, including the secondary effects argument that Deja Vu now claims it was never able to litigate. It was able to argue this point at the preliminary injunction stage; the district court just rejected its argument and then entered a final judgment. Whether the district court correctly rejected Deja Vu's claims appears not to be challenged at this stage; rather, Deja Vu argues that it never had the opportunity to raise its secondary effects argument. This claim is refuted by the district court's treatment of the issue in its Memorandum.

Finally, all courts have been proceeding as if Deja Vu had raised all of its claims. The district court specifically stated as much, as did this Court in *Deja Vu I*. 274 F.3d at 386 (noting that following the dissolution of the first preliminary injunction, "[t]he plaintiffs also moved for another preliminary injunction, raising all of their constitutional challenges to the Ordinance"). The district court also specifically ruled that the record was closed in 1999 when it granted the permanent injunction and made a final ruling on the merits.[6] Finally, in *Deja Vu I*, we noted

---

[6] The Order, in relevant part, states: "In this action, as stated on the record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been

(Continued on following page)

that "[t]he parties agree that Metropolitan Nashville validly enacted the Ordinance. Additionally, Metropolitan Nashville's stated interests in reducing crime, open sex, and the solicitation of sex are substantial." *Deja Vu I*, 274 F.3d at 392.[7] Deja Vu's only recourse, if it wishes to challenge any unsettled aspects of the current statute, is to file a new case in district court.

## III.

For the foregoing reasons, we AFFIRM the district court's order dissolving the permanent injunction and dismissing the case.

---

granted by the preliminary injunction. The preliminary injunction heretofore issued is herewith made a permanent injunction. Accordingly, the defendants are permanently enjoined from enforcing Chapter 6.54 of the Metropolitan Code. The applications for interim attorneys' fees shall be deemed final applications for fees in favor of the prevailing parties as of the conclusion of this litigation by the entry of this order. The entry of this order shall constitute the final judgment in this action." JA 557-58 (footnotes omitted).

[7] We also "we decline[d] to tie the hands of local governments by extending *City of Paducah* [*v. Investment Entm't. Inc.*, 791 F.2d 463 (6th Cir. 1986)]'s reasoning to those regulations [such as the one before us] aimed only at redressing the secondary effects of the sex entertainment industry." *Deja Vu I*. 274 F.3d at 393.

274 F.3d 377

United States Court of Appeals,
Sixth Circuit.

**DEJA VU** OF NASHVILLE, INC., a Tennessee
corporation; Michael Rucker,
individually; Michael Butler, individually;
Meroney Entertainment, Inc.,
d/b/a Ken's Gold Club, a Tennessee corporation;
The Pleasure Palace, Inc., a
Tennessee corporation; Dawn Pierce, individually;
Elizabeth Martz,
individually; Jerry C. Pendergrass, individually;
The 822 Corporation; The
421 Corporation, Plaintiffs-Appellants (99-5071),
Plaintiffs-Appellees (00-5881),
Plaintiffs-Appellees/Cross-Appellants
(00-5284/5288),

v.

The METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY,
TENNESSEE;
Emmett Turner, Chief of Police of the Metropolitan
Police Department,
Defendants-Appellees (99-5071),
Defendants-Appellants (00-5881), Defendants-
Appellants/Cross-Appellees (00-5284/5288).
**Nos. 99-5071, 00-5284, 00-5288 and 00-5881.**

Argued Jan. 24, 2001.
Decided and Filed Dec. 6, 2001.
Rehearing and Suggestion for Rehearing En Banc
Denied Feb. 5, 2002.

Bradley J. Shafer (argued and briefed), Shafer & Associates, P.C., Lansing, MI, Michael F. Pleasants (briefed), Memphis, TN, H. Louis Sirkin (briefed), Laura A.

Abrams, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH, John E. Herbison (briefed), Nashville, TN, for Plaintiffs-Appellants for No. 99-5071.

Francis H. Young (briefed), Shayna R. Abrams (briefed), Metropolitan Department of Law, Nashville, TN, Karl F. Dean (argued), Metropolitan Government of Nashville & Davidson County, Nashville, TN, for Defendants-Appellees for No. 99-5071.

Bradley J. Shafer (argued and briefed), Andrew K. Wilkins (briefed), Shafer & Associates, P.C., Lansing, MI, Michael F. Pleasants (briefed), Memphis, TN, H. Louis Sirkin (briefed), Laura A. Abrams (briefed), Jennifer M. Kinsley (briefed), Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH, John E. Herbison (briefed), Nashville, TN, for Plaintiffs-Appellees/Cross-Appellants for Nos. 00-5284, 00-5288.

Francis H. Young (briefed), Shayna R. Abrams (briefed), Metropolitan Department of Law, Nashville, TN, Karl F. Dean (argued), Metropolitan Government of Nashville & Davidson County, Nashville, TN, for Defendants-Appellants/Cross-Appellees for Nos. 00-5284, 00-5288.

Bradley J. Shafer (argued and briefed), Andrew K. Wilkins (briefed), Shafer & Associates, P.C., Lansing, MI, Michael F. Pleasants, Memphis, TN, H. Louis Sirkin (briefed), Laura A. Abrams, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH, John E. Herbison (briefed), Nashville, TN, for Plaintiffs-Appellees for No. 00-5881.

James L. Charles, Francis H. Young (briefed), Shayna R. Abrams (briefed), Metropolitan Department of Law, Nashville, TN, Karl F. Dean (argued), Metropolitan

Government of Nashville & Davidson County, Nashville, TN, for Defendants-Appellants for No. 00-5881.

Before: MARTIN, Chief Judge; WELLFORD and SUHRHEINRICH, Circuit Judges.

BOYCE F. MARTIN, Jr., C.J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. WELLFORD, J. (pp. 403-07), delivered a separate opinion concurring in part and dissenting in part.

## OPINION

BOYCE F. MARTIN, JR., Chief Judge.

On August 19, 1997, the Council for the Metropolitan Government of Nashville and Davidson County, Tennessee, passed an ordinance, now codified as Metropolitan Code of Laws Chapter 6.54, "Sexually Oriented Businesses," containing licensing requirements for adult entertainment businesses. Shortly thereafter, plaintiffs in this consolidated appeal filed suit in federal court to enjoin the Ordinance's enforcement on First and Fourteenth Amendment grounds. Since that time, injunctions have been issued, dissolved, and issued anew in response to the four amended versions of the Ordinance enacted by Metropolitan Nashville during the four-year pendency of this litigation.[1] The parties now appeal and cross-appeal various aspects of the district court's injunctive and procedural rulings.

---

[1] Although Metropolitan Nashville has enacted four new versions of the Ordinance in response to various rulings by the district court, with the most recent version enacted in 2000, only the 1999 version is relevant to this appeal. Every citation thus will be to the 1999 version unless otherwise noted.

## I.

The Ordinance requires all "sexually oriented businesses" to obtain a license issued by the Sexually Oriented Businesses Licensing Board before being permitted to operate. *See* Metropolitan Code of Laws § 6.54.030(A). Additionally, all entertainers working within a sexually oriented business must obtain a permit from the Board. *See* M.C.L. § 6.54.060(A). The permit requirements are essentially identical to the license requirements. *See* M.C.L. § 6.54.080(A). Licenses and permits must be renewed on a yearly basis, and can be suspended or revoked for, among other things, repeated failure to comply with any of the licensing or permitting requirements, failure to pay required fees, or knowingly denying access to law enforcement personnel during business hours. *See* M.C.L. §§ 6.54.110; 6.54.150(A)(2), (3), and (6). The Ordinance includes a civil disability provision (M.C.L. §§ 6.54.050(B)(2); 6.54.080(A)(2)), a disclosure provision (M.C.L. §§ 6.54.040(A)(5); 6.54.070(A)(4)), and a no-touch/buffer zone provision (M.C.L. § 6.54.140(C)), applicable to all license and permit-seekers. Metropolitan Nashville charges applicants five hundred dollars to apply for a license, and one hundred dollars to apply for a permit. *See* M.C.L. § 6.54.090.

The plaintiffs are a group of establishments and individuals providing adult entertainment in the form of live nude or semi-nude performance dance, as well as selling, renting or presenting sexually oriented books, magazines, and videos. The "Deja Vu plaintiffs" include four corporations, two owner/operators, and two dancers. The "Pendergrass plaintiffs" include two corporations and one owner/operator. All the plaintiffs fall within the Ordinance's definitions of either "sexually oriented business," "operator," or "entertainer," and thus each is subject to the Ordinance's requirements. *See* M.C.L. §§ 6.54.010(G), (P), and (Y), respectively.

In October 1997, the Deja Vu plaintiffs sought a preliminary injunction based solely on the ground that the Ordinance failed to provide prompt judicial review of licensing decisions by the Board. The Deja Vu plaintiffs reserved their right to request a future preliminary injunction on other grounds. Shortly thereafter, the Pendergrass plaintiffs filed a similar complaint, requesting a preliminary injunction on the grounds that the Ordinance failed to provide prompt judicial review of licensing decisions and that its civil disability provisions violated the First Amendment. On December 11, the district court consolidated the two cases and granted a preliminary injunction because the Ordinance failed to provide for prompt judicial review; the district court did not address the constitutionality of the disability provisions. Metropolitan Nashville subsequently amended the Ordinance, and, on December 7, 1998, the district court dissolved the preliminary injunction. The plaintiffs timely appealed the dissolution.

The plaintiffs also moved for another preliminary injunction, raising all of their constitutional challenges to the Ordinance. On October 1, 1999, the district court granted the motion, finding the definitions of "sexually oriented" and "sexually oriented theater," the civil disabilities provision, the disclosure provision, and the fee amounts unconstitutional. The court further found that the tainted provisions could not be severed, and therefore enjoined the entire Ordinance. In December, the district court made the preliminary injunction permanent. Metropolitan Nashville timely appealed the district court's decision striking down the definitions and the civil disability, disclosure, and fee provisions; the refusal to sever the tainted provisions; and the imposition of the permanent injunction. The plaintiffs timely cross-appealed the district court's decision upholding the Ordinance's definition of "sexually oriented business/establishment" and the buffer zone/no-touch provision. The plaintiffs also appealed the district court's grant of a protective order to Metropolitan Nashville.

In early 2000, Metropolitan Nashville again amended the Ordinance to remove the portions that the district court found unconstitutional, and then filed a Rule 60(b) motion to dissolve the injunction with the district court. The district court denied the motion on the grounds that it no longer had jurisdiction over the case because Metropolitan Nashville had already appealed its judgment to this Court. Metropolitan Nashville timely appealed that decision as well.

## II.

As an initial matter, we note that none of Metropolitan Nashville's issues on appeal have been rendered moot by the current version of the Ordinance, which was enacted in early 2000. "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). Here, Metropolitan

Nashville explicitly enacted the 2000 version in order to enforce the Ordinance pending this appeal. It has repeatedly expressed its intention to reenact those portions of the Ordinance judged unconstitutional by the district court at the earliest opportunity. Accordingly, we must now address the constitutionality of the following portions of the Ordinance: the definitions of "sexually oriented," "sexually oriented business/establishment," and "sexually oriented theater;" the civil disability provision; the disclosure provision; the fees provision; the buffer zone/no touch provision; and the mechanisms provided for judicial review. We review a district court's decision to grant or deny a permanent injunction, including both its factual and legal conclusions, *de novo* when constitutional facts are at issue. *See Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir.1997). All other factual findings are reviewed for clear error. *See id.*

### A.

First, we must examine the Ordinance's definitions of "sexually oriented," "sexually oriented business/establishment," and "sexually oriented theater" to determine whether they are unconstitutionally overbroad. A law is overbroad under the First Amendment if it "reaches a substantial number of impermissible applications" relative to the law's legitimate sweep. *New York v. Ferber*, 458 U.S. 747, 771, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). The overbreadth doctrine exists "to prevent the chilling of future protected expression." *Staley v. Jones*, 239 F.3d 769, 779 (6th Cir.2001). Therefore, any law imposing restrictions so broad that it chills speech outside the purview of its legitimate regulatory purpose will be struck down. For the same reason, the plaintiffs have standing to challenge the

Ordinance's overbreadth even though they do not dispute that the Ordinance applies to each of them. "The overbreadth doctrine constitutes an exception to traditional rules of standing" and allows claimants to assert the rights of parties not before the court. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir.1994).

We agree with the district court that the definition of "sexually oriented" is unconstitutionally overbroad. In relevant part, the Ordinance defines "sexually oriented" as "any exhibition of any motion pictures, films or videos depicting 'specified sexual activities' or 'specified anatomical areas.'" M.C.L. § 6.54.070(Y). "Specified anatomical areas" include "[l]ess than completely and opaquely covered" buttocks and female breasts. M.C.L. § 6.54.010(BB). Thus, any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is a "sexually oriented" film under the Ordinance, irrespective of whether the film's content constitutes "adult entertainment" or causes the type of secondary effects, such as crime (sexual and nonsexual) and public health risks, that Metropolitan Nashville seeks to regulate. Because this definition could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent, it is overbroad.

We do not, however, find the definition of "sexually oriented business/establishment" overbroad. The Ordinance defines a "sexually oriented business/establishment" at Section 6.54.010(Z) as:

> Any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or

> characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observations by patrons therein.

Four subsections then follow this definition, defining the terms "sexually oriented bookstore," "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented video store." M.C.L. §§ 6.54.010(Z)(1)-(4). If the "sexually oriented business/establishment" definition stood alone, we would find it unconstitutionally overbroad, as it could encompass such businesses as a hotel that offers its guests access to an adult cable channel. The record reflects, however, that a business will be subject to the Ordinance's licensing requirements only if the business satisfies both the "sexually oriented business/establishment" definition *and* one of the four subsections' definitions. When read in conjunction with the four subsections, the definition no longer sweeps too broadly.

For the same reason, we find no constitutional problem with the Ordinance's definition of "sexually oriented theater," the only subsection definition challenged by the plaintiffs on appeal. "Sexually oriented theater," defined in Section 6.54.010(Z)(3), means:

> [A]n enclosed area, not including a booth, regularly used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

"Specified sexual activities" include sexual intercourse and fondling of buttocks or breasts. *See* M.C.L. § 5.43.010(CC).

A significant number of mainstream movies depict people fondling breasts or buttocks, and an even larger number "relate to" sex. Again, the risk that this definition might chill a range of protected speech would require us to find it unconstitutionally overbroad if it stood alone. The additional requirement of being a "sexually oriented business/establishment," however, narrows the Ordinance's application to those theaters that regularly present material distinguished or characterized by an emphasis on sex acts or particular body parts. Again, reading the definitions together saves the parts from overbreadth.[2]

Finally, even though we find the Ordinance's definition of "sexually oriented" overbroad, we must, if possible, give effect to the Ordinance's severability clause so as not to invalidate the entire act. *See Moore v. Fowinkle*, 512 F.2d 629, 637 (6th Cir.1975). By including a severability clause, found at Section 6.54.170, Metropolitan Nashville created a presumption that it did not intend the statute's validity to hinge on any constitutionally infirm provision. *See Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 932, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). We find that the definition of "sexually oriented" can easily be severed from the Ordinance without having any impact on the licensing scheme. In fact, we are a bit confused as to why this definition had to be litigated at all, as Metropolitan Nashville argues strenuously in its brief that it is superfluous. Our independent review of the Ordinance reveals that, indeed, the phrase "sexually oriented" is never used but in conjunction with some other word that has its own definition. *See generally* § 6.54.010 (containing definitions of "sexually oriented films," "sexually oriented theaters," and "sexually oriented nightclubs," to name a few). For whatever reason, Metropolitan Nashville saw fit to have us decide whether this apparently meaningless term must be removed from its Ordinance. We have and it must.

---

[2] We note that these constitutional issues would never have arisen had the Ordinance been written more clearly. Section 6.54.010(Z) could have simply stated that its definition must be read in conjunction with its subsections. Alternatively, the Ordinance could have defined "sexually oriented business/establishment" at Section 6.54.010(Z) as "any one of the following businesses," and then listed the four businesses currently defined in the subsections (with the necessary limiting language incorporated into each business's definition). Whatever the difficulties inherent in writing laws, it is not too much to ask that municipalities carefully draft legislation intended to regulate protected activities.

## B.

Metropolitan Nashville next appeals the district court's decision that the Ordinance's "civil disabilities provisions" violate the First Amendment. Under those provisions, no individual license or permit applicant who has had a misdemeanor conviction for a crime of a sexual nature may receive a license or permit for two years following the date of the conviction.[3] *See* M.C.L. §§ 6.54.050(B)(2)(a); 6.54.080(A)(2)(a). No applicant who has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *See* §§ 6.54.050(B)(2)(b); 6.54.080(A)(2)(b).

---

[3] The following constitute "crimes of a sexual nature" under the Ordinance: "the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given." M.C.L. § 6.54.010(D).

To satisfy Article III's standing requirement, (1) a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be "fairly traceable" to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury. *See Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir.1999). The Supreme Court has further defined the injury-in-fact requirement by stating that a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Plaintiffs Deja Vu and Michael Butler, Deja Vu's former Vice-President, are the only Deja Vu plaintiffs who allege they have standing to challenge the civil disabilities provisions because Butler was convicted of statutory rape in 1995. Although they acknowledge Butler no longer works for Deja Vu, they claim that he quit his job only because Deja Vu was forced to seek a license in 1999, after the district court dissolved the first preliminary injunction and denied plaintiffs a stay pending its decision on their motion for a second preliminary injunction. Therefore, Deja Vu and Butler contend they were forced to choose between the "Scylla of intentionally flouting state law and the Charybdis of forgoing what [they believed] to be constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). They argue that they should not be denied standing to challenge the civil disabilities provisions merely because Butler no longer works for Deja Vu, when it was the enforcement of that very provision that forced Butler to resign.

Although attractive, this argument has no merit under standing jurisprudence. Because Deja Vu does not currently employ anyone who could arguably be subjected to the disabilities provisions, any threat it alleges with regard to those provisions is, by definition, hypothetical. Hypothetical injury does not equal injury-in-fact. *See Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Moreover, Deja Vu did not rehire Butler as Vice President when the district court enjoined enforcement of the civil disabilities provisions, nor does it allege any plans to do so should we uphold that injunction. Similarly, Butler does not allege he would seek such a job were it not for the disabilities provisions. Therefore, neither plaintiff has suffered a harm likely to be redressed by a favorable decision. *See Coyne*, 183 F.3d at 494 (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). Because none of the other individual plaintiffs alleged that the civil disability provisions rendered them ineligible to receive a permit, we agree with Metropolitan Nashville that none of the Deja Vu plaintiffs have standing to challenge the civil disabilities provisions.

We find, however, that the Pendergrass plaintiffs do have standing to challenge the provisions. At the time the district court ruled on this issue, Jerry Pendergrass was an officer, a director, and the sole shareholder of the 822 Corporation. Pendergrass was convicted of a misdemeanor obscenity offense on May 22, 1997, and he was required to apply for a license by March 15, 1999, within two years of the date of his conviction. Because of the civil disabilities provisions, Pendergrass, and consequently the 822 Corporation, was ineligible to receive an operating license. Accordingly, both parties have standing to challenge those provisions.

The Pendergrass plaintiffs' challenge has not been mooted merely because over two years have passed and his business now possesses an operating license, as this case falls squarely within the "capable of repetition, yet evading review" exception to mootness. *See Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). Under this exception, the Pendergrass plaintiffs must show that 1) the challenged action will be of a duration too short to be fully litigated prior to its cessation or expiration, and 2) there is a "reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* Even if an applicant seeks a license the day after his or her misdemeanor conviction, that still leaves only two years for the applicant to exhaust the Ordinance's application and appeal procedures and fully litigate the claim in the federal courts. As a practical matter, this cannot be done. Additionally, because the range of disabling sex crimes is relatively large, and because, as Metropolitan Nashville itself points out, it is reasonably foreseeable that someone with a sex crime history will choose to work for or be involved with a sexually oriented business, there is a reasonable probability that a future person connected with the 822 Corporation will have a criminal history that renders the Corporation ineligible for a license under the civil disabilities provisions. Therefore, we will proceed to the merits of the plaintiffs' claim.

"[N]ude dancing of the type at issue here is expressive conduct," which falls "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). Therefore, any ordinance regulating nude dancing must be analyzed to ensure it does not unduly impair the exercise of First Amendment rights. The level of scrutiny we apply depends on the type of regulation we address. For instance, if the challenged law is "content based," that is, intended to impact speech, the law must survive strict scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). "In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," one which was first enunciated as a four-step test in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Turner Broad.*, 512 U.S. at 642, 114 S.Ct. 2445. Systems of prior restraint will be upheld only if they provide for prompt judicial review of all decisions denying the right to speak, while also passing the appropriate level of scrutiny. *See Freedman v. State of Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

The plaintiffs argue that the Ordinance should be subjected to strict scrutiny because the civil disabilities provisions amount to an unlawful prior restraint in violation of the First Amendment. "A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials," and any system of prior restraint carries a heavy presumption against its validity. *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir.2000). Although the plaintiffs are correct in asserting that the Ordinance constitutes a system of prior restraint, that argument more properly applies to our examination of the Ordinance's mechanisms for providing prompt judicial review, *see* Part II. F, *infra*, rather than our decision of which level of constitutional scrutiny to apply. What the plaintiffs actually, though obliquely, argue here is that the Ordinance is content-based, and thus must withstand strict scrutiny. *See, e.g., Turner Broad.*, 512 U.S. at 642, 114 S.Ct. 2445. Metropolitan Nashville responds that the Ordinance is a content-neutral regulation aimed at redressing the secondary effects of sexually oriented businesses that must satisfy the less-demanding four-part test of *O'Brien*.

We have previously recognized that ordinances aimed at regulating adult entertainment businesses constitute content-based regulations, but that "a distinction may be drawn between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality" when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998). To withstand constitutional scrutiny, then, (1) the Ordinance must have been enacted within Metropolitan Nashville's constitutional power; (2) the Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech; and (4) the Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir.1995) (citing *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673).

The parties agree that Metropolitan Nashville validly enacted the Ordinance. Additionally, Metropolitan Nashville's stated interests in reducing crime, open sex, and the solicitation of sex are substantial. *See Richland Bookmart, Inc.*, 137 F.3d at 440. Moreover, regulations aimed at redressing the secondary effects of the sex industry are unrelated to the suppression of erotic speech. *See East Brooks Books, Inc.*, 48 F.3d at 226. Therefore, we need only determine whether the Ordinance's civil disabilities provisions constitute merely an incidental burden on the plaintiffs' First Amendment rights that is essential to furthering Metropolitan Nashville's stated interest in battling the secondary effects of the sex industry.

The Supreme Court has recently noted that "crime and other public health and safety problems are caused by the presence of nude dancing establishments. . . ." *Pap's A.M.*, 529 U.S. at 300, 120 S.Ct. 1382. The Ordinance's civil disabilities provisions serve to weed out those applicants most likely to engage in the type of criminal behavior that the Ordinance seeks to redress by temporarily disqualifying those who have recently committed such acts from working for sexually oriented establishments, or alternatively, from declaring any sexually oriented establishment closely associated with such an individual ineligible to operate. In light of the temporary nature of the ban and the narrow reach of the provisions (applying only to those who have committed a felony sex crime within the last five years or a misdemeanor sex crime within the last two years), we do not find that these provisions violate the Constitution.

Contrary to the plaintiffs' arguments, our holding in *City of Paducah v. Investment Entm't, Inc.*, 791 F.2d 463 (6th Cir.1986), does not control this case. In *City of Paducah*, we invalidated a municipal regulation that revoked all business licenses and permits from those businesses whose employees had distributed or exhibited obscene material. *See City of Paducah*, 791 F.2d at 464. In that case, however, we explicitly found that the purpose of the challenged portion of the regulation was "to control future expression by businesses that have been subjected to the nuisance abatement procedure." *Id.* at 470. In contrast, we find here that the Ordinance's civil disabilities provisions exist to combat the sex crimes connected with sexually oriented establishments by temporarily prohibiting those recently convicted of such crimes from employment with those establishments. Because both the Ordinance and the civil disabilities provisions are unrelated to speech, we are faced with a different issue than that decided in *City of Paducah*. Furthermore, because *City of Paducah* was a "prior restraint" case, it was concerned with whether the regulation at issue provided sufficient mechanisms for prompt judicial review. *See id.* We agree that the instant Ordinance must provide for prompt judicial review, and that such review must encompass any findings of ineligibility pursuant to the civil disabilities provisions. *See* Part II. F, *infra.* Nothing in the civil disabilities provisions themselves, however, renders them facially unconstitutional, and we decline to tie the hands of local governments by extending *City of Paducah's* reasoning to those regulations aimed only at redressing the secondary effects of the sex entertainment industry.

## C.

Because the district court found the Ordinance's civil disabilities provisions unconstitutional, it also invalidated its "disclosure provisions" which require that applicants provide certain information in order to conduct a background check into each applicant's criminal history. The disclosure provisions require that license and permit applicants divulge such personal information as full name, height, weight, hair color, eye color, date of birth, current residential address, and all residential addresses for the prior three years. *See* §§ 6.54.040(A)(5)(a), (b), and (c); 6.54.070(A)(4)(a), (b), (c), and (d). Additionally, applicants must provide their fingerprints and two portrait photographs to facilitate the background check, which the Metropolitan Police Department conducts. *See* §§ 6.54.040(A)(5)(g); 6.54.070(A)(4)(g). Because each plaintiff either has or will have to apply for either a permit or a license, all are required to provide this information to the Board. Accordingly, all the plaintiffs have standing to challenge this provision.

The Ordinance states that the required disclosures are "for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature." *See* M.C.L. § 6.54.040(A)(5)(c); M.C.L. § 6.54.070(A)(4)(c); M.C.L. § 6.54.070(A)(4)(d). Because this purpose is "unrelated to the suppression of expression," we again apply the four-part *O'Brien* test to determine whether the disclosure provisions are unconstitutional. *Pap's A.M.*, 529 U.S. at 289, 120 S.Ct. 1382.

As stated above, *O'Brien* requires us to determine whether Metropolitan Nashville enacted the disclosure provisions (1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc.*, 48 F.3d at 226. Here, Metropolitan Nashville legitimately enacted the disclosure provisions in order to facilitate the background check. In addition, the required disclosures ensure continuing compliance with the Ordinance's licensing and permitting requirements. Although the plaintiffs point to testimony by Metropolitan Police Department Vice Squad Captain Bawcum that only a person's name and date of birth are used to run a background check, they do not argue that the required disclosures do not further Metropolitan Nashville's substantial governmental interest in eradicating the secondary effects of sexually oriented businesses.[4] "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Borman's, Inc. v. Mich. Prop. & Cas. Guar. Assoc.*, 925 F.2d 160, 162 (6th Cir.1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979)). The plaintiffs have failed to convince us that requiring identifying information as part of the application process does not facilitate enforcement of the Ordinance's provisions (for instance, by assuring that the entertainer displaying the permit matches the physical description contained in the applicant's file). The provisions thus satisfy the first, second, and third parts of the *O'Brien* test.

---

[4] Simply because Metropolitan Nashville codified only its interest in facilitating the background checks as the justification for the required disclosures, we are not prohibited from taking into account other interests the disclosures may serve. "Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in the judgment).

The plaintiffs argue that the disclosure provisions fail the fourth prong, however, because under the Tennessee Open Records Act, members of the public with illicit motives can easily obtain the personal information contained in the plaintiffs' application files, which includes their names and residential addresses. Therefore, the provisions will pose more than an incidental burden on First Amendment activities because those wishing to engage in such activities will be chilled by the threat of public exposure and possible violence. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (stating purpose of First Amendment is "to protect unpopular individuals from retaliation – and their ideas from suppression"). Metropolitan Nashville responds that the required information is protected from public release (1) by the district court's order; (2) by Metropolitan Nashville's own opinion; (3) by the Tennessee Attorney General's opinion; and (4) by our decision in *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064-65 (6th Cir.1998) (finding release of certain personnel information constitutionally prohibited).

Metropolitan Nashville's first three arguments cannot stand. First, the district court sealed the application files only "during the pendency of this litigation," and therefore its order is insufficient to protect any applicant's information indefinitely. Second, neither Metropolitan Nashville nor the Tennessee Attorney General have the power to create exceptions to Tennessee's Open Records Act. The Tennessee Supreme Court has interpreted the Tennessee Open Records Act, T.C.A. § 10-7-503(a), to mean that "the legislature reserved to itself alone the power to make public policy exceptions." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 685 (Tenn.1994) (quoting *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn.1986)). Nonetheless, we agree with Metropolitan Nashville that our decision in *Kallstrom* saves this provision from being unconstitutional by prohibiting public release of all applicants' names and current and past residential addresses.

*Kallstrom* held that police officers have a constitutionally protected privacy interest in their otherwise-public personnel file information, which includes addresses, phone numbers, and family member information, when the release of that information creates "a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives." *Kallstrom*, 136 F.3d at 1063. Here, the plaintiffs presented significant evidence that the requirement that applicants submit their names and past and current addresses to a public forum poses serious risks to their personal security. For instance, plaintiff Dawn Pierce, an entertainer at Deja Vu, testified that entertainers in the past have been stalked, harassed, and injured by customers, and that she is afraid to make public her name and residential address, as required by the Ordinance, because of serious potential risks to her physical safety and well-being. Dancers use stage names and have unpublished addresses and telephone numbers in order to minimize the risks of such harassment. Additionally, Pierce testified that there are a number of local organizations that have taken a strong stance against her profession. She is therefore also concerned that requiring her to release her name and residential address to a public forum will result in such groups harassing her at her home as a result of her choice to engage in erotic speech. Such risks also apply to individual business associates, such as registered agents, officers, directors, certain shareholders, club managers, and assistant managers, all of whom are likely to have to provide their names and addresses to the Board. *See* M.C.L. § 6.54.040(A)(5)(i), (j).

Applying *Kallstrom's* reasoning to this context, we find that all sexually oriented business license and permit applicants' names and current and past residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act. Metropolitan Nashville cannot publicly release such private information; it can, however, require applicants to provide the identifying information to the licensing board for the limited purpose of ensuring compliance with the Ordinance's regulations, provided Metropolitan Nashville keeps that information under seal. "Anonymity is a shield from the tyranny of the majority," *McIntyre*, 514 U.S. at 357, 115 S.Ct. 1511, but it is not a shield from all legitimate regulation. Therefore, as a result of our decision in *Kallstrom*, prohibiting public dissemination of the required private information, Metropolitan Nashville's disclosure requirements satisfy the fourth part of *O'Brien* because they are essential to ensuring continuing compliance with the Ordinance's licensing and permitting requirements, and because the reporting requirements pose only an incidental burden on applicants.

### D.

The plaintiffs next challenge the constitutionality of the fees charged pursuant to the Ordinance. The government may not tax the exercise of a constitutionally protected right.

*See Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir.1997). Nonetheless, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity." *Id.* at 1109-10. Such a fee is not excessive, even if it is more than nominal, so long as it is "reasonably related to the expenses incident to the administration of the ordinance." *Id.* at 1110.

The Ordinance charges applicants five hundred dollars for a license, and one hundred dollars for a permit. Additionally, the Ordinance requires that "[i]f the [license or permit] application is denied, one-half of the fee shall be returned." *See* M.C.L. § 6.54.090(A), (B). Although the district court found the direct cost of processing license applications was thirty-three dollars, and the direct cost of processing permit applications was forty-three dollars, it failed to include in its calculations the $40,000 paid annually to an inspector "to enforce the civil disabilities provision," because it had already held that provision unconstitutional. The record reflects that comparing the yearly total of estimated fee revenue with the annual costs of enforcing the Ordinance results in a net loss to Metropolitan Nashville. Accordingly, we find that the fees charged are reasonably related to the expenses incident to the administration of the Ordinance.

### E.

Next the plaintiffs raise challenges to the Ordinance's "no touch/buffer zone" provision. Section 6.54.140(C) states that

> No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

As with any other violation of Chapter 6.54, one violation of the buffer zone may result in a five hundred dollar fine, suspension of the operating license for between five and thirty days, or both. *See* M.C.L. § 6.54.150(B)(2). A second violation within a two-year period requires suspension for between thirty-one and ninety days. *See* M.C.L. § 6.54.150(B)(3). A third violation will result in a one-year revocation of the license. *See* M.C.L. § 6.54.150(C)(9).

As an initial matter, we note that the three-foot buffer zone surrounds the stage, not the dancer. Therefore, we reject the plaintiffs' argument that the provision creates a "floating buffer zone." *See* M.C.L. § 6.54.140(C); M.C.L. § 6.54.050(A)(3) (stating "[a] three-foot boundary from the outer edge of the stage shall be indicated on the floor . . . so that the customer will not invade the three-foot boundary").

We find that this provision also satisfies the *O'Brien* test: Metropolitan Nashville properly passed this portion of the Ordinance pursuant to its police power; it intended this provision to redress the high instances of sex crimes prevalent at sexually oriented businesses and to deter the spread of disease; and requiring dancers to perform on stages removed three feet from any customer poses only an incidental burden on their right to erotic speech that is no greater than is essential to further Metropolitan Nashville's substantial interests. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 412-13 (6th Cir.1997) (upholding six-foot buffer zone to more effectively enforce ban on contact between erotic dancers and audience members and to prevent occurrence of activities likely to result in criminal behavior or to prevent risk of disease).

We agree with the plaintiffs that the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a "collective effort on behalf of shared goals." *See Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). The dancers and customers work together as speaker and audience to create an erotic, sexually-charged atmosphere, and although society may not find that a particularly worthy goal, it is a shared one nonetheless. The right to associate for expressive purposes, however, is not absolute. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623, 104 S.Ct. 3244, 82 L.Ed.2d 462. In attempting to restrict opportunities to engage in prostitution and to guard against the spread of disease through the public release or exchange of bodily fluids, Metropolitan Nashville has gone no farther than necessary by requiring a three-foot distance between the erotic dancer and the audience. *See DLS*, 107 F.3d at 412-13.

The plaintiffs repeat the same arguments we rejected in *DLS*. First, they argue that the no touch/buffer zone provision goes too far because of its economic impact on the relevant market. Specifically, the plaintiffs point to evidence showing that compliance with the no touch/buffer zone provision will require extensive renovations of their clubs. We rejected that argument, however, in *DLS*, noting that the relevant inquiry is not whether the Ordinance will cause any economic impact on the sexually oriented businesses. *Id.* at 413. "[T]he First Amendment requires only that [Metropolitan Nashville] refrain from effectively denying [sexually oriented business owners] a reasonable opportunity to open and operate an adult theater within the city. . . . " *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Although we do not doubt that compliance with the Ordinance will cut into the plaintiffs' profits, the plaintiffs have failed to introduce any evidence showing that they will not have a reasonable opportunity to operate their establishments.

Second, the plaintiffs argue that the provision denies to erotic dancers the ability to profit from their expression by foreclosing the possibility of receiving tips. The plaintiffs are correct that the government cannot prohibit compensation for the exercise of First Amendment rights. *See, e.g., Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 115-16, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). Customers, however, remain free under the Ordinance to tip dancers before or after their performances. Alternatively, the clubs could decide to increase dancers' salaries, rather than requiring them to earn a living wage from their tips. In any event, the no touch/buffer zone provision merely requires that audience members not hand the dancers money during their dances, a sufficiently limited burden on the plaintiffs' First Amendment rights. For a similar reason, we also reject the plaintiffs' argument that the buffer zone violates the First Amendment by prohibiting all verbal communication between entertainers and customers. Again, if customers and entertainers cannot converse while standing a mere three feet apart, it is because the plaintiffs have chosen to play their music at such a volume that conversation is impossible. Contrary to the plaintiffs' claims, the Ordinance does not force entertainers to choose between verbal communication and no music; as Metropolitan Nashville suggests, the plaintiffs can simply turn their music down a bit. The point is that any problems dancers may experience with receiving tips or speaking with customers will be caused not by the Ordinance, but by the clubs' refusal to alter their standard operating procedures in response to these constitutional regulations.

Finally, the plaintiffs challenge the no touch/buffer zone provision on the ground that it does not contain a mens rea requirement. As the Ordinance does not expressly limit the prohibited touching to intentional or knowing touches, the plaintiffs claim that even entertainers who merely seek to push a customer away will violate it. We disagree with the plaintiffs' reading of this provision. The provision states, in relevant part, that "[n]o customer shall be permitted to have any physical contact with any entertainer" during a live performance, and that all such performances must occur on a stage "removed at least three feet from the nearest customer." M.C.L. § 6.54.140(C). Rather than reading the provision as enacting two separate requirements, we read it as a single mandate, with the "no touch" portion setting forth a broad policy statement that no contact between dancers and customers shall occur during performances, and the "buffer zone" rule showing the specific way to implement that policy by prohibiting clubs from allowing customers within three feet of the stage during dances. Therefore, the provision places a duty not on the entertainer to avoid touching customers, but on the owners and operators of clubs to protect entertainers from being touched by customers by requiring customers to stay three feet away from the stage. *See also* § 6.54.050(A)(3) (detailing the licensee club's responsibility for noticeably demarcating the three-foot buffer zone). Furthermore, logic compels this interpretation. It would simply be nonsensical for Metropolitan Nashville to put the onus of customer control on the entertainer who is already removed at least three feet from the customer, is engaged in live entertainment, and is, by definition, incapable of preventing an approaching customer from touching her without engaging in the prohibited touching herself. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982). Accordingly, we reject the plaintiffs' claim that the no-touch/buffer zone provision imposes *any* duty on entertainers, much less one that requires them to be held strictly liable for any violations.

Moreover, the Ordinance does not allow for strict liability, even for licensees. Section 6.54.150(B)(1) states that a club will be fined or have its license suspended (or both) for violating any of the Ordinance's provisions. However, Subsection (B)(1) also affords licensees the affirmative defense that management was "powerless to prevent" the violation. Accordingly, liability for violating the no-touch/buffer zone provision is limited to those instances where a licensee could have, but failed to prevent the proscribed conduct. The provision, thus interpreted, is constitutional.

## F.

Finally, we address the plaintiffs' argument that the Ordinance fails to provide the prompt judicial review required of prior restraint schemes by *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Specifically, the plaintiffs argue that because the Ordinance requires them to proceed to court via a common law writ of certiorari, it fails to protect their right to expeditious judicial review on the merits. Before reaching that issue, however, we must address Metropolitan Nashville's argument that the plaintiffs have failed to present us with a justiciable controversy. We review issues of Article III justiciability *de novo*. *See NRA v. Magaw*, 132 F.3d 272, 278 (6th Cir.1997).

### 1.

Metropolitan Nashville argues that the plaintiff businesses and operators have no standing to challenge the licensing procedures because they have all been issued licenses. For support, Metropolitan Nashville cites *DLS*, which held that a business and its owner did not have standing to challenge a licensing procedure under which they had already received licenses. *See DLS*, 107 F.3d at 413.

> If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses. . . . Therefore, they cannot demonstrate that their challenge to the licensing procedures satisfies the three core requirements for standing under Article III.

*Id.*

Metropolitan Nashville misunderstands the plaintiffs' argument. Here, plaintiffs have raised a facial challenge claiming that the Ordinance's procedures for reviewing Board decisions fail to provide for prompt judicial review as required by *Freedman*. The appeal procedures under the Ordinance are essentially identical whether the Board initially refuses to grant a license, or whether the Board suspends or revokes an already-existing license. *See* §§ 6.54.040(E)(2) (procedure for appealing denial of license); 6.54.150(E)(6) (procedure for appealing suspension or revocation of license). Therefore, this case is distinguishable from the *DLS* scenario, where "[a]ny modification to the licensing scheme would have no effect on the potential threat that [the plaintiffs] face under renewal or revocation proceedings." *See DLS*, 107 F.3d at 414.

It is immaterial that Metropolitan Nashville has not yet sought to suspend or revoke the plaintiffs' licenses. A mere threat to First Amendment interests is a legally cognizable injury. *See Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989). "In the area of freedom of expression, it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office . . . whether or not he applied for a license." *Freedman*, 380 U.S. at 56, 85 S.Ct. 734. Arguing that a statute lacks sufficient procedural safeguards is one way to allege overly broad licensing discretion.

> [Plaintiff's] argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the . . . statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the

> same vice as a statute delegating excessive administrative discretion.

*Id.* at 57, 85 S.Ct. 734. "By the same token, . . . Plaintiff does not have to wait until his license is revoked to have standing to challenge the allegedly overbroad licensing scheme that would allow its revocation." *See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1075 (6th Cir.1994). Therefore, the plaintiff businesses and operators have standing to raise their facial challenge to the Ordinance.

Additionally, we find this case ripe for review. Ripeness requires that the "injury in fact be certainly impending." *NRA*, 132 F.3d at 280 (citation omitted). The doctrine exists "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1057 (6th Cir.1999) (internal quotation marks and citations omitted). In determining whether the entertainers' claim is ripe, we consider "whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision." *Id.* at 1058.

Metropolitan Nashville claims that the entertainers are not under any threat with regard to the Ordinance because the entertainers have not yet sought a permit. We disagree. The entertainers join with the other plaintiffs in challenging the Ordinance's judicial review provisions. Because this is a purely legal issue, and because, as already demonstrated, the plaintiffs have standing to raise it, the issue is fit for a judicial decision. Moreover, as Metropolitan Nashville acknowledges in its brief, "[p]arties not yet affected by the actual enforcement of the statute are allowed to challenge actions under the First Amendment in order to ensure that an overbroad statute does not act to 'chill the exercise of free speech and expression,' a constitutionally protected right." Gov. Br. at 12 (citing *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir.1995)). The plaintiffs facially challenge the Ordinance's overbreadth, alleging that the lack of prompt judicial review vests too much discretion in the Board. By Metropolitan Nashville's own admission, then, their claim is ripe for review.

### 2.

We now turn to the merits of the plaintiffs' claim that the Ordinance constitutes a system of prior restraint, and that it fails to guarantee the requisite prompt judicial review of license/permit denials and revocations. We review a district court's order dissolving a preliminary injunction for an abuse of discretion, reviewing *de novo* where the dissolution is based upon a legal conclusion. *See Reese v. City of Columbus*, 71 F.3d 619, 622 (6th Cir.1995). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1378 (6th Cir.1995). "A factual or legal error alone may be sufficient to establish that the court abused its discretion in making its final determination." *Id.* (internal punctuation and citations omitted).

A district court must consider four factors when determining whether to grant or deny a preliminary injunction: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. *See Dixie Fuel Co.*, 171 F.3d at 1059-60. In First Amendment cases, the first factor will often be determinative. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). This is because the Supreme Court has recognized that even minimal infringement upon First Amendment values constitutes irreparable injury. *See Newsom*, 888 F.2d at 378. Additionally, if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment. *See Connection Distrib.*, 154 F.3d at 288. Moreover, "it is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Accordingly, we shall focus our attention on the first factor.

A "prior restraint" exists when the exercise of a First Amendment right depends on the prior approval of public officials. *See Nightclubs, Inc.*, 202 F.3d at 889 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)). "Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Freedman*, 380 U.S. at 57, 85 S.Ct. 734. In *Freedman*, a unanimous Supreme Court found that three procedural safeguards were required for a prior restraint scheme to avoid constitutional infirmity. *See id.* at 58-59, 85 S.Ct. 734. First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the merits. *See id.* at 59, 85 S.Ct. 734. Second, the licensing scheme "must also assure a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* Third, the licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor. *See id.* at 58, 85 S.Ct. 734. Licensing schemes in a city ordinance regulating sexually oriented businesses constitute a prior restraint that must incorporate at least the first two *Freedman* procedural safeguards. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion of O'Connor, J.);[5] *see also Nightclubs, Inc.*, 202 F.3d at 890; *East Brooks Books, Inc.*, 48 F.3d at 224.

Sections 6.54.040(E) and 6.54.070(D) of the Ordinance provide the procedures for obtaining relief from the denial of a license or permit:

> Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from

---

[5] Three justices held only the first two *Freedman* safeguards applied, three justices would have applied all three, *see id.* at 238-39, 110 S.Ct. 596 (Brennan, J., concurring in the judgment), and three more would not have applied any. *See id.* at 244, 110 S.Ct. 596 (White, J., concurring in part and dissenting in part); *see also id.* at 253, 110 S.Ct. 596 (Scalia, J., concurring in part and dissenting in part). Accordingly, at a minimum, we must apply the first two *Freedman* safeguards.

> the date the metropolitan government was served with a petition for a writ of certiorari.[6]
>
> Tennessee state law requires that if an appeal is taken from an administrative decision barring an applicant from engaging in First Amendment activities, "the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari." T.C.A. § 27-9-111 (Michie 1999). The plaintiffs argue that these provisions fail to comply with the first two *Freedman* safeguards. We agree.

"Whether the common law writ of certiorari will issue is a matter of discretion. It is not issued as a matter of right." *Boyce v. Williams*, 215 Tenn. 704, 389 S.W.2d 272, 277 (1965). Thus, the Ordinance, in requiring that aggrieved applicants proceed to court via a discretionary route, fails to guarantee a "final judicial adjudication on the merits," as required under *Freedman*'s first safeguard. Metropolitan Nashville points to *State v. Johnson*, 569 S.W.2d 808 (Tenn.1978), for support that Tennessee courts will not deny a writ in this context. *See id.* at 815 (finding that writs should issue where denial of the writ is "tantamount to the denial to either party of a day in court"). Even that case, however, reiterates the rule that "certiorari is a discretionary writ." *Id.* at 814 (noting that whether a lack of appellate remedy exists is "critical" for determining whether to grant a writ). Because Metropolitan Nashville has failed to demonstrate that the denial of a writ would be tantamount to the denial to an applicant of a day in court, we cannot agree that this discretionary writ guarantees an aggrieved applicant that a court will hear and decide the merits of her claim, as required by *Freedman.*[7]

---

[6] Although this language could be read as authorizing two avenues for appeal, a direct appeal by which Metropolitan Nashville does not have to file the record of all proceedings within ten days, and an appeal via a common law writ of certiorari whereby Metropolitan Nashville must timely file the record, Metropolitan Nashville insisted at oral argument that the provision authorizes only an appeal via the common law writ.

Metropolitan Nashville also argues that the plaintiffs' concern that the courts may not promptly determine whether or not to grant the writ petition is unfounded. For support, Metropolitan Nashville cites to an affidavit presented to the district court from the Clerk and Master for the Chancery Courts of Davidson County, stating that "[g]enerally, our office processes all petitions for a writ of certiorari . . . within two days of the filing of the petition." This anecdotal affidavit, however, is insufficient to establish that aggrieved applicants are *guaranteed* prompt judicial review.

First, the affidavit does not address Davidson County's circuit courts, where the Ordinance also directs that an aggrieved applicant's appeal may lie. Therefore, the record is completely absent of any evidence as to the turn-around time of petitions filed with the circuit court, and it was clearly erroneous of the district court to find otherwise. More importantly, the affidavit only avers the chancery court's *general* practice. The Constitution requires more. "[A]ny limiting construction must 'be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'" *Nightclubs, Inc.*, 202 F.3d at 891 n. 6 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)). A well-established practice is one where "a well-understood and *uniformly applied* practice has developed that has virtually the force of a judicial construction." *City of Lakewood*, 486 U.S. at 770 n. 11, 108 S.Ct. 2138 (emphasis added). In the absence of such strong evidence, "[w]e can neither presume that municipal officials will act in good faith and respect a speaker's First Amendment rights, nor read a requirement into an ordinance that is not fairly and evidently present." *Nightclubs, Inc.*, 202 F.3d at 891 n. 6. A "uniformly applied" practice is simply not the same as a "generally" applied one. Because the chancery court clerk's affidavit does not present such strong evidence, and because the record contains no evidence as to the circuit court's practices, we cannot agree with the district court that the Constitution's requirements have been satisfied by this proof.

---

[7] Theoretically, for instance, an aggrieved applicant could file a § 1983 suit against the Board and its members. Although such a suit would not provide complete relief, as the applicant would be foreclosed from "speaking" until a final adjudication, it is a far cry from the facts of *Johnson*, where the court found the erroneous suppression of evidence would force Metropolitan Nashville to drop its criminal charges against the defendant and that double jeopardy would prohibit the city from filing new charges. In that context, Metropolitan Nashville would have literally had no legal recourse if the court had denied its petition for a writ of certiorari, and it is therefore at least potentially distinguishable from this case.

Second, the affidavit purports only to describe the average length of time it takes to "process" all petitions for a writ of certiorari. It says nothing about whether the court is obligated to grant the writ at all, and therefore, it fails to address the biggest problem with the Ordinance's judicial review provision. Without some affirmative evidence showing that every writ of certiorari will be granted, we find that the Ordinance's judicial review provisions do not guarantee prompt judicial review, as required by the First Amendment.[8] The lack of a judicial review provision renders the entire statute facially unconstitutional, and therefore, severing the ineffectual provision will not save the statute. Under these circumstances, we cannot give effect to the severability clause, but must enjoin enforcement of the entire Ordinance.

## III.

In the first of two final matters, the plaintiffs ask us to vacate the magistrate's grant of a protective order to Metropolitan Nashville with regard to the plaintiffs' discovery requests dealing with Metropolitan Nashville's basis for believing sexually oriented businesses cause "secondary effects." The plaintiffs concede, however, that although they moved for the district court to review the magistrate's decision, the court did not rule on the motion before issuing its decisions enjoining the Ordinance's enforcement. We decline to rule on the propriety of the magistrate's order before the district court has a chance to review it.

---

[8] The Ordinance does preserve the status quo by allowing existing businesses to continue to operate until an adjudication on the merits and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal. *See* M.C.L. 6.54.040(E)(3) and (4); *see also* M.C.L. 6.54.070(D)(3) and (4) (applying same rules to permit applicants). Merely preserving the status quo, however, is not sufficient to satisfy *Freedman*. The decision whether or not to grant a license must still be made within a specified, brief period, and the licensing scheme "must *assure* a prompt judicial decision." *See Freedman*, 380 U.S. at 59, 85 S.Ct. 734 (emphasis added). The Ordinance's discretionary appeals procedure fails to satisfy these separate requirements.

Finally, we briefly address Metropolitan Nashville's argument that the district court erred in finding that its appeal to this Court divested the district court of jurisdiction to hear its Rule 60(b) motion to dissolve the permanent injunction. The filing of an appeal with this Court generally divests a district court of jurisdiction over the case. *See First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 345 (6th Cir.1976). In the district court's discretion, however, it may enter an order stating that it is disposed to grant a Rule 60(b) motion, which would allow the requesting party to move this Court to remand the case, thereby once again vesting jurisdiction in the district court. *See id.* at 346. Nonetheless, Metropolitan Nashville concedes that the district court is under no obligation to issue such an order, and in fact characterized this appeal as a "procedural misstep" at oral argument. We agree. The district court did not abuse its discretion in refusing to rule on Metropolitan Nashville's Rule 60(b) motion following Metropolitan Nashville's appeal to this Court.

## IV.

For the foregoing reasons, we AFFIRM the district court's finding that the definition of "sexually oriented" is unconstitutional under the First Amendment. We further AFFIRM the district court's finding that the definitions of "sexually oriented business/establishment" and "sexually oriented theater," and the no touch/buffer zone provision satisfy the First Amendment. Finally, we AFFIRM the district court's refusal to hear Metropolitan Nashville's Rule 60(b) motion. We REVERSE, however, the district court's finding that the civil disabilities provision, the disclosure provision, and the fee amounts are unconstitutional. We further REVERSE the district court's finding that the Ordinance's judicial review procedures satisfy the First Amendment. Upon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of "sexually oriented" and its judicial review procedures have been corrected.

WELLFORD, Circuit Judge, concurring in part and dissenting in part.

I concur in the Chief Judge's opinion in this difficult case in most respects. I write separately to set out my views with respect to part II.F dealing with standing and prompt judicial review. The majority found that prompt judicial review is "required by *Freedman* [*v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) ]." *Supra* at 398. *Freedman*, however, involves a very different set of circumstances from the present controversy, because that case presented a First Amendment challenge to the "Maryland motion picture censorship statute."[1] *Id.* at 52, 85 S.Ct. 734. The Supreme Court pointed out that under the Maryland law in question "there is *no* statutory provision for judicial participation in the procedure which bars a film, *nor even assurance of prompt judicial review.*" *Id.* at 55, 85 S.Ct. 734 (emphasis added). Furthermore, the Court recognized the unique nature of the film industry, stating that "a censorship system for motion pictures presents *peculiar dangers* to constitutionally protected speech." *Id.* at 57, 85 S.Ct. 734 (emphasis added). Our present case, of course, does not involve freedom of speech in a film, but freedom of expression in a sexually-oriented place of business.

---

[1] Indeed, in *Freedman*, the state conceded "that the picture [at issue] does not violate the statutory standards." *Freedman*, 380 U.S. at 52, 85 S.Ct. 734.

## I. *STANDING*

I would not hold *Freedman* controlling on the issue of standing because of the circumstances in that case are entirely different from those in the instant controversy. This court has interpreted *Freedman* broadly to apply to similar types of cases brought by adult "entertainment" operators and performers, such as plaintiffs. For example, *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir.1994), cited by the majority, involved "threatened revocation" of a liquor license if topless dancing were to occur at an Inkster, Michigan bar and nightclub. *G & V Lounge, Inc.*, 23 F.3d at 1073. With that scenario and the evidence of threatened and imminent action by the state of license revocation, this court held that plaintiff operator had standing to bring a First Amendment claim, citing Supreme Court authority, including *Freedman.* Standing would be present in such a situation even if no revocation had taken place.

In the instant case, however, the plaintiffs make no allegation of threatened revocation of their licenses (or actual censorship). The majority recognizes Metropolitan Nashville's argument "that the plaintiff businesses and operators have no standing to challenge the license procedures because they have all been issued licenses." What it fails to recognize, however, is that no plaintiff has been threatened with revocation under the ordinance. Metropolitan Nashville concedes that "parties not yet affected by actual enforcement of the statute are allowed to challenge actions under the First Amendment." It is doubtful, however, particularly in light of *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir.1997), that the plaintiffs, not operating under any threat of revocation, would have standing to challenge the constitutionality of procedures involved in the Ordinance at issue.

I would hold that plaintiffs have standing to challenge the substantive criteria for the issuance of licenses or permits, but do not have standing to challenge "the licensing scheme." *See DLS*, 107 F.3d at 413. In *DLS*, we reasoned that the plaintiffs lacked such standing because they "already have succeeded in obtaining a license under [the applicable ordinance]. If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses under [different provisions]." *Id.* I am not persuaded that, in the instant case, the procedures involved for revocation are not different from the procedures required for applying for initial licenses.

I find neither *Newsom v. Norris*, 888 F.2d 371 (6th Cir.1989), nor *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th cir.1995), both cited in the majority opinion, to be particularly helpful to plaintiffs on the issue of standing. *Newsom* involved a prison setting and alleged retaliation against inmate advisors. *Dambrot* involved a university's alleged discriminatory harassment policy in a discharge situation addressing the issue of freedom of speech. Neither case involved the type of expression here involved, held repeatedly to be subject to reasonable, narrowly drawn state regulation.

*FW/PBS* is a case much more analogous to this case than *Freedman*. The city ordinance in *FW/PBS* purported to regulate businesses similar to those operated by plaintiffs in this case. Plaintiffs were permitted to raise a facial challenge to the ordinance because special inspections and certificates of occupancy were demanded of sexually-oriented businesses. Such provisions are absent from the Metropolitan Nashville ordinance.

## II. *PROMPT JUDICIAL REVIEW*

The Court in *Freedman* emphasized that the censorship of a film "puts an initial burden on the exhibition."[2] *Id.* Again, this is not the situation in the instant controversy. In the film censorship area, *Freedman* mandated a procedure "which must . . . assure a prompt final judicial decision." *Id.* at 59, 85 S.Ct. 734. The Supreme Court emphasized the need for prompt judicial review of film censorship laws, recognizing that in the Maryland scheme there was "*no assurance* of prompt judicial determination." *Id.* at 60, 85 S.Ct. 734 (emphasis added). Apparently, the scheme contained no provision for judicial review of film censorship, an entirely different circumstance from the instant case. Whether or not there is an adequate provision for prompt judicial review in these circumstances is a legal question and forms a basis for injunctive relief if it is wanting. The legality of prior restraints of freedom of expression in adult sexually-oriented businesses, while not illegal per se, requires the special attention of this court. *FW/PBS*, 493 U.S. at 225-26, 110 S.Ct. 596. To be constitutional, a prior restraint must place reasonable and prompt time constraints on the administrative process of issuing business licenses and permits and must provide "expeditious judicial review" of administrative decisions. *Id.* at 227, 110 S.Ct. 596 (citing *Freedman*, 380 U.S. at 58-60, 85 S.Ct. 734).[3]

---

[2] "Films differ from other forms of expression." *Freedman*, 380 U.S. at 61, 85 S.Ct. 734.

The Court in *FW/PBS* mandated that any such licensing scheme provide for the "*possibility* of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228, 110 S.Ct. 596 (emphasis added). The Court also relied on the specific circumstances of that case in holding that, unlike *Freedman*, the city did not have the burden of proof once in court. *Id.* at 230, 85 S.Ct. 734. The question of prompt judicial review of the license permit action was whether there were "adequate bulwarks."[4] *Id.* Moreover, the Court in *FW/PBS* raised on its own volition the question of standing of certain plaintiffs who challenged the civil disability provision of the ordinance. *Id.* at 234-35, 110 S.Ct. 596. The Court held that there was no standing to challenge revocation on the basis of past criminal conviction or conduct where no petitioner actually demonstrated revocation of a license under the civil disability provision. *Id.* at 235, 110 S.Ct. 596.

I believe that the Ordinance at issue does meet the standards set out in *FW/PBS*, because it provides for much more than a "possibility" of prompt judicial review. Sections 6.54.04(E) and 6.54.070(D) of the ordinance specify certain procedures for obtaining relief from denial of a license or permit. First, a denial "*may be* immediately appealed to the circuit or chancery courts of Davidson County." (Emphasis added.) There is no requirement in the ordinance as to the form of relief that may be sought by the unsuccessful applicant.[5] There is no reason why an applicant may not pursue a declaratory judgment action or seek injunctive relief if a constitutional issue is claimed to be involved in either state or federal court because of an asserted invalid or improper denial. If the applicant, under the above sections of the ordinance, does choose to appeal by seeking a writ of certiorari, he or she is provided with a prompt record and an opportunity to challenge the procedures involved in a denial. Contrary to the Chief Judge, I believe that *State v. Johnson*, 569 S.W.2d 808 (Tenn.1978), does support the proposition that Tennessee court would entertain a petition for a writ of certiorari from denial of an application even if the action taken were discretionary in nature.

---

[3] *FW/PBS* makes it clear that the "licensing scheme" in this type of case "does not present the grave dangers of a censorship system" that was present in *Freedman*. *FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596.

[4] The authority cited for this proposition was *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1962), a book censorship case. The Rhode Island law at issue in *Sullivan* provided for no judicial review.

I respectfully disagree with the statement by the majority in footnote 7, because temporary injunctive relief or mandamus could issue in a § 1983 suit against Metropolitan Nashville if an application were denied based on, for example, racial, sexual, or other illegal discriminatory animus, thus allowing the plaintiff to "speak" pending final adjudication. Furthermore, under the majority holding of *FW/PBS*, I believe that a rejected applicant has the opportunity for an adequate and expeditious judicial review based upon available remedies, as supported also by the affidavit of the Clerk of the Davidson County Chancery Court. There is a sufficient protection in such an event of denial of a meritorious application under the ordinance and the proof for prompt judicial review; in short, there is an "adequate bulwark" by judicial review available. The majority opinion states in footnote 8 that "[t]he ordinance does preserve the status quo by allowing existing businesses to continue to operate *until an adjudication on the merits* and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal." (Emphasis added.) I agree with this interpretation of the effect of the ordinance, and this also presents an adequate and reasonable bulwark constitutionally, in my view.

---

[5] Despite any purported argument made to the effect that appeal by writ of certiorari is the only statutory avenue of relief upon denial of an application, the ordinance speaks for itself in this regard.

In sum, I respectfully disagree that there is, in this ordinance, "lack of judicial review provision." There is not only such a provision but there is also a reasonable stay provision to protect a plaintiff pending judicial review. We are not dealing in this case with censorship, or attempted censorship, of speech, books, or films (as in *Freedman, supra*).

Finally, even if the judicial review provisions were inadequate, I would conclude that the severance provision in the ordinance is effective, and I would not agree to void enforcement of the entire ordinance because of perceived insufficient means of prompt judicial review.[6]

---

[6] A case cited as giving support to the majority view is a four-to-three decision of the court, *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), which permitted a facial challenge to a municipal ordinance regulating newspaper racks on city streets. The later case of *FW/PBS* states the principle applicable in this situation: "Limitation on the time within which the licensor

(Continued on following page)

Accordingly, I respectfully dissent from parts of the majority decision for the reasons indicated.

---

must issue the license as well as the availability of prompt judicial review satisfy the 'principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *FW/PBS*, 493 U.S. at 230, 110 S.Ct. 596.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE,
INC. et al.

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND
DAVIDSON COUNTY, et al.

No. 3:97-1066
Chief Judge Nixon

## MEMORANDUM

(Entered December 8, 1997)

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby orders that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly. The Court held a hearing on December 1, 1997, during which time the parties had an opportunity to present evidence and argue their positions.

After reviewing the record, the Court finds that the Plaintiffs have satisfied their burden of proving the elements necessary for a prelimnary injunction, and orders that the Defendants be hereby enjoined from enforcing any of the provisions of Chapter 6.54 of the Metropolitan Code of Laws.

## I. BACKGROUND

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment, and operate adult theaters and bookstores. They are seeking to enjoin a regulatory scheme enacted by the Council of the Metropolitan Government of Nashville and Davidson County on August 19, 1997, which requires "sexually oriented businesses" to obtain licenses before being permitted to operate, and adult entertainers employed in these establishments to also obtain permits in order to perform. The mayor approved the ordinance on August 25, 1997, and it took effect on November 1, 1997. Existing business have one hundred and twenty days after November 1st to apply for a license, Nashville and Davidson County, Tenn., Code § 6.54.030(F) (Supp. Sept. 1997), and entertainers have forty-five days from that date to apply for a permit, § 6.54.060(B).

The ordinance specifically requires partners in a partnership who participate in the day-to-day running of a sexually oriented business, majority stockholders of such businesses, and any officers or directors of such businesses (collectively "operators"), to obtain licenses to operate issued by a specially established board. § 6.54.010(S). The term "sexually oriented business" as defined by the ordinance includes bookstores, video stores, theaters, and nightclubs which "regularly present[ ] material or exhibitions distinguished or characterized by an emphasis on matter depicting . . 'specified sexual activities' or "specified anatomical areas.'" § 6.54.010(S)(1)-(4). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams of booth, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 6.54.070(A)(2). Applicants who have been convicted or pleaded nolo contendere to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time, two years from the date of conviction for a misdemeanor, and five years from the date of conviction for a felony. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers seeking to obtain a permit. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons specifically prescribed in the statute, including discovery that an operator employs an entertainer who does not have a permit, or furnishes sexually explicit material to minors. § 6.54.100, § 6.54.140.

Once the application is received, the board must distribute a copy of the application "promptly" to the police department, the department of codes and administration, the health department, the fire department, and the applicant. § 6.54.040(A)(1). The departments are required to conduct inspections and to provide the reports to the board within thirty days of receipt of the application. § 6.54.040(B)(3). The board is then required to make its determination within twenty days of receiving these reports. §6.54.040(C)(1). However, if the board needs additional information, or is awaiting out-of-state documentation, it may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the board is required to schedule a hearing at its next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[1] §§ 6.54.040(E)(1)(b), 6.54.070(D)(6)(b). The denial of a license is required to be mailed within ten days to the applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may be made directly to the Chancery Court for the state of Tennessee. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. *Id.* In addition, the ordinance permits an applicant to appeal by filing a petition for a writ of certiorari, in which case the board must submit all records of the proceedings before it to the court within ten days. *Id.*

## II. DISCUSSION

In order to determine the propriety of injunctive relief, the court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc., v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.,* 52 F.3d 1373, 1381 (6th Cir. 1993) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well. *Planned Parenthood Ass'n v. McWherter,* 716 F. Supp. 1064, 1066 (M.D. Tenn. 1980); *cf. Performance Unlimited,* 52 F.3d at 1385-86 (quoting Merrill Lunch, Pierce, Fenner & Smith, 836 F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry upon the first factor, although it will also discuss the others in turn.

---

[1] The board is required to meet twice per month. § 6.54.020(D)(1). Board Policy No. 10 dictates that the board must meet the second and fourth Tuesdays of every month.

### A. Likelihood of Success on the Merits

For the purpose of the preliminary injunction, the Plaintiffs have limited their motion to two issues, first, they challenge the ordinance on its face because it fails to provide for prompt judicial review of the board's decision, and second, they challenge the disabling provisions of the ordinance.

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,'" as is the case here. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223-24 (1990) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 225 (1990) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland,* 38 U.S. 51, 58 85 S.Ct. 734 (1965). Specifically, the decision-maker must not be given unlimited discretion so as to risk suppression of protected speech. *FW/PBS*, 493 U.S. at 225026. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis*, 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief period time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

### 1. Undue Delay

The Plaintiffs allege that this ordinance fails to meet these promptness requirements for three reasons. First, it allows for a wait of almost one hundred days before an appeals hearing is conducted. This includes a one day wait for the board to distribute the application;[2] thirty days for the departments to conduct their inspections; twenty days for the board to make its determination; in certain circumstances, an additional thirty days for the board to act; one day for the applicant to request an appeals hearing (assuming he or she acts promptly); and fourteen days for the board to meet and hold the hearing. The Plaintiffs claim that this delay exceeds the sixty-day delay in *East Brooks Books*, which the Sixth Circuit held was unconstitutional.

---

[2] Although the statute itself only requires that the board distribute the application promptly, the board has interpreted this to mean that the application should be distributed the same day they are received, or the following business day if received after 4:00 p.m. Board Policy No. 5. For the purposes of this motion, the Court will accept the board's interpretation.

The Defendants maintain that the ordinance places brief and specified time periods on the board to act on the application. They calculate the time period in which an initial decision is made differently, without including the time required to hold a hearing on appeal before the board. They point out that the ordinance imposes only an eighty-one-day waiting period before the initial determination by the board, and that this is close to the sixty-day period which was upheld in *DLS, Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995), and *Ellwest Stereo Theater, Inc. v. Boxer,* 718 F. Supp. 1553, 1570 (M.D. Tenn. 1989).

However, neither *East Brooks Books, DLS,* or *Ellwest* are directly on point with respect to this issue. The opinion in *Ellwest* does not even reach the issue of whether the length of time given to a decision-maker to issue a license suppresses free speech. Similarly, the court in *East Brooks Books* did not discuss whether the time given to the decision-makers to issue a license was not constrained and therefore a form of unbridled discretion. Rather, the court focused on whether there was prompt judicial review of the licensing decisions. *See East Brooks Books,* 48 F.3d at 224-225. The Supreme Court in *FW/PBS* has made clear however, that these are two separate inquiries. First, the ordinance must place limits on the time during which the decision to issue a license is made, and preserve the status quo during that time, and second, there must also be prompt judicial review of this decision. *FW/PBS,* 493 U.S. at 227. Finally, while the district court in DLS did discuss the issue of whether the licensing ordinance sufficiently limited the time in which the decision-maker must determine whether to issue a license, the Sixth Circuit on appeal did not touch upon the issue. This was because the Sixth Circuit determined that the Plaintiffs did not have sanding to challenge the licensing scheme. *See DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 413 (6th Cir. 1997). Thus, since the district court erroneously concluded that the plaintiffs had standing to challenge the licensing scheme, any decision that it made with respect to this issue is dicta.

Accordingly, the most recent and direct authority on this issue is the Supreme Court decision in *FW/PBS.* In that case, Justice O'Connor[3] determined that the licensing scheme at issue in that case should be struck down because it allowed for an "indefinite postponement of the issuance of a license." *FW/PBS,* 493 U.S. at 227. This was so because although the ordinance required the chief of police to rule on the issuance of a license within thirty days after the receipt of the application, a license could not be issued without the approval of other departments. *Id.*

---

[3] Only two other Justices, Stevens and Kennedy, joined in this part of Justice O'Connor's opinion. However, Justices Brennan, Marshall, and Blackmum in their concurrence agreed with the aspects of Justice O'Connor's opinion that are at issue here. These Justices' only disagreement with O'Connor's opinion was with her determination that the government need not bear the burden of effecting the denial of a license in court, or bear the burden of proof once in court. *See FW/PBS,* 493 U.S at 439-42

The ordinance did not limit the time during which these departments were required to make their inspections. *Id.*

The ordinance presently at issue has a sufficiently circumscribed time limit for the issuance of a license or permit. The only indeterminate time allowance in the ordinance is the provision that directs the board to distribute the application, when first received, "promptly" to the various departments that need to conduct inspections. § 6.54.040(A)(1). However, the board has sufficiently cured this by adopting a policy which requires them to distribute the application at the latest by the next business day. Board Rule 5. The Plaintiffs nevertheless maintain that the waiting period, even if sufficiently specified, is too long to constitute a "reasonable time period." *See East Brooks Books,* 48 F.3d at 224. "The reasonableness of the time period during which a restraint on speech may operate prior to judicial review 'may vary in different contexts.'" *11126 Baltimore v. Prince George's County, MD,* 58 F.3d 988, 997 (4th Cir. 1995) (quoting United States v. Thirty-Seven Photographs, 402 U.S. 363, 374 (1971)). The court should take into account "the type of judgments to be made by the government officials and the hardship placed on the class of applicants by the restraint." *Id.* (citation omitted).

As an initial matter, it should be noted that the time period in which an initial decision must be made does not include the time it takes to appeal or obtain a hearing at the administrative level. The Sixth Circuit made this clear in *East Brooks Books,* when it included the time required to obtain a hearing before the Chief of Police in its computation of the time it took to obtain *judicial review* of the ordinance. *East Brooks Books,* 48 F.3d at 225. That said, it appears from review of other decisions that the time it takes to obtain an initial licensing determination under the ordinance presently at issue is at the borderline of constitutionality. *See, e.g., 1126 Baltimore,* 58 F.3d at 997 (150-day delay is not a reasonably brief time); *TK's Video, Inc. v. Denton County, Tex.,* 24 F.3d 705, 708 (5th Cir. 1994) (upholding 60-day waiting period); *Chesapeake B & M, Inc. v. Hartford County, Md.,* 831 F. Supp. 1241, 1249-50 (D. Md. 1993) (upholding 44-day waiting period), *rev'd in part, vacated in part, and remanded on other grounds,* 58 F.3d 1005 (4th Cir. 1995) (en banc); *Wolff v. City of Monticello,* 803 F. Supp. 1568, 1574 (D. Minn. 1992) (90-day waiting period not unreasonable). However, considering that the applications must be distributed to other departments for inspections, that the board may only hold the applications for thirty of those days under specified circumstances, and that businesses already established can continue operating pending a licensing decision, the Court finds that this waiting period is not unreasonable.

### 2. Status Quo

However, not only must the waiting period be reasonable, but the status quo must be preserved during that time. *East Brooks Books,* 48 F.3d at 224. The Plaintiffs' second challenge to the ordinance relates to this issue. They claim that the ordinance does not provide for the preservation of the status quo pending judicial review, or in the event that the board fails to issue a timely licensing opinion. The Court agrees. Section 6.54.140 of the ordinance, combined with Section 6.54.020(G)(3) provide for only a ten-day hiatus before the board's decision takes effect. Section 6.54.140 provides that a license/permit shall be valid until ten days have elapsed since the board's decision, or until a hearing on the matter is held. If at the conclusion of the hearing, the board affirms its denial of license or permit, this decision does not take effect until ten days have elapsed, in order to give the aggrieved party time to file an appeal. Section 6.54.020(G)(3). The ordinance is silent as to whether the effect of a denial is stayed after those ten days pending judicial review. The board's policies are equally silent on this issue. Although Board Policy 40 states that any denial, revocation, or suspension of a license shall not go into effect until thirty days have elapsed since the board's final decision and there has been no appeal, it does not explain what the status of a license is while an appeal is pending.

Furthermore, the ordinance does not specify what the effect would be of the board's failure to act on an application in a timely manner. The Defendants have presented the Court with Board Policy 70, which states in relevant part:

> It shall be the policy of this Board that any license or permit not acted on by the Board in the time allowed by the ordinance, due to any fault on the part of the Board or the Board's administration, shall be granted.

Def's Ex. 2 at 2. However, as the Plaintiffs have pointed out, the policy only relates to failure to act on an application due to fault by the Board. It does not encompass failure to act timely due to failure of, for example, the police or fire department to conduct its investigation within the prescribed thirty days. Moreover, this policy is inconsistent with Section 6.54.020(C)(10), which prohibits the board from issuing a license "unless the police department has investigated the applicant's criminal history . . . ". Finally, it is unclear from the policy just how a license would be granted if the reason a license has not been issued on time is that the board has not been able to meet or to form a quorum.[4] Without any action on the part of the board, the applicant will presumably not have a tangible permit in his or her possession.

### 3. Judicial Review

Lastly, the Plaintiffs contend that the ordinance is invalid because it fails to provide for prompt judicial review. Again, the Court agrees with the Plaintiffs. Under the ordinance as written, an applicant can be required to wait for an indefinite period of time before obtaining judicial review of the board's decision. After a hearing is requested, the applicant should receive a hearing in fourteen days, since the board holds meetings bimonthly. § 6.54.020(D)(1). The board must then notify an applicant of the denial of his or her license within ten days after a meeting is conducted. The ordinance specifies that the applicant can then appeal from an unfavorable decision at a hearing directly to the Chancery Court of Davidson County through a petition for a writ of certiorari. § 6.54.160. The administrative record must be transmitted to the court within ten days of the hearing, § 6.54.160, however, a hearing before the court must wait at least ninety days in order to allow for the filing of a brief, response, and reply brief. Davidson County Local Rule § 30.02. Although the appeal would at that point have precedence over other matters before the court, the scheduling of a hearing is dependent on the court's docket.

---

[4] Board Policy 20 requires that a quorum must be present in order for the board to take action

Thus, the Plaintiffs are not guaranteed judicial review within any specified period of time. Moreover, the state chancellor is not required to issue an opinion within any mandated period of time. *See* Tenn. Code Ann. § 27-9-111.

The circuits are currently split with respect to the meaning of "prompt judicial review." The First, Fifth, and Seventh Circuits have concluded that access to a judicial proceeding is sufficient to constitute prompt judicial review. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas*, 62 Brook. L. Rev., 1217, 1220 (1996). Conversely, the Fourth, Sixth, and Eleventh Circuits have required a prompt judicial *determination. Id.* at 1241-42. In *East Brooks Books*, the Sixth Circuit concluded that a potential wait of over five months before a judicial ruling was impermissible. 48 F.3d at 225. It further determined that the possibility of appeal to the Tennessee state courts through a writ of certiorari did not constitute prompt judicial review precisely because this procedure did not require the courts to issue a ruling within any specified period of time. *Id.* The ordinance at issue in the present case allows for up to fifteen days for the board to hold a hearing (one day to request and fourteen days for the hearing to be held), ten days before the denial is mailed to the applicant, ten days for the board to forward a copy of the proceedings before it to the court, and a wait of at least ninety days before a state court can issue a ruling. The applicant must thus wait at least three and one-half months minimum before a court issues a ruling on its application. However, since there are no time restraints on the court's issuance of a decision, potential delays of over five months are possible under this statute. *East Brooks Books* prohibits this kind of delay. *See also Smith v. City of Clarksville*, No. 3-94-0539 (M.D. Tenn. Mar. 14, 1996) (invalidating a licensing scheme similar to the one at issue because it failed to provide for expeditious judicial review).

The Defendants offer three possible ways to rehabilitate this ordinance. First, they contend that under the local rules, it is possible for an applicant to move the Chancery Court for an expedited briefing schedule, and pursuant to Local Rule 18.01[5], move the court to set an early trial date. They contend that while Tenn. Code Ann. § 27-9-111 provides that in appeals of board determinations, the court shall set a trial ninety days after the board files a transcript of the proceedings before it, and that the trial shall have precedence over other litigation, this statute does not *require* a court to wait ninety days before setting a case for trial. They further assert that to the extent that it does mandate this, it violates the separation of powers doctrine, as it infringes upon the court's ability to set its own docket. *See Summers v. Thompson*, 764 S.W.2d 182, 188-190 (Tenn. 1988) (Drowota, J., concurring) (discussing generally the respective powers of the judiciary and the legislature). However, it is clear that the Defendants' proposed method of judicial review would not set clear boundaries on the time that a court must make a decision, and thus does no pass constitutional muster under *East Brooks Books*.

---

[5] The rule provides: "Cases shall be set for trial in one of the following ways: (a) by agreement of counsel after consultation with the Calendar Clerk for Chancery and Probate Court or the Assignment Clerk for Circuit Court; (b) by motion; or (c) by the court with notice to counsel."

Second, the Defendants contend that, unlike the ordinance in *Smith v. City of Clarksville*, the ordinance at issue does not require that any appeal be processed through a writ of certiorari at the state level. Although the ordinance at hand does provide that an applicant may "choose" to appeal to the state through a writ of certiorari, § 6.54.100(M), the ordinance by its terms does not foreclose other methods of appeal. Specifically, the Defendants maintain that an applicant can appeal by petitioning for a temporary restraining order ("TRO") and preliminary injunction. However, again, the Defendants have not directed the Court to any rule which requires a court to decide a motion for a TRO or preliminary injunction within any prescribed period of time. Thus, this procedure suffers from the same infirmities as a petition for writ of certiorari.

Finally, the Defendants have submitted to the Court Proposed New Local Rule, § 30.05, which provides that:

> If the petitioner-appellant alleges that the decision of an administrative tribunal or agency unlawfully results in the prior restraint of his or her rights that are guaranteed by the First Amendment to the U.S. Constitution, and either party requests an expedited hearing, the court shall immediately schedule a hearing, establish an expedited briefing schedule that will permit the court to adjudicate the matter promptly, and in no event later than fourteen days after the record is filed.

However, the proposed rule suffers from several problems, the most important of which is that it is *a proposed* rule, and there is no guarantee that it will be adopted by the courts. Furthermore, the text of the rule is unclear, as it does not specify exactly *what* must be done in fourteen days: the scheduling of a hearing, and adjudication, or both. Thus, the Court cannot conclude that this local rule meets the expeditious judicial review requirements of the First Amendment. That aside, it appears to the Court that this kind of rule is exactly what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine. Although the legislature may not be able to require the courts to decide a matter within a prescribed period of time, the directives of the First Amendment may still be met if an ordinance provides that a permit or license should issue in the event that the court does not adjudicate a matter within a given time (which must be less than five months per *East Brooks Books*).

### 4. Disabling Provisions

Because the Court has determined that the ordinance is unconstitutional because it does not preserve the status quo or provide for prompt judicial review, it does not need to reach the issue of whether the disabling provisions of the ordinance are unconstitutional.

## B. Irreparable Harm

Nonobscene nude dancing is constitutionally-protected activity within the scope of the First Amendment. *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560, 565-66 (1991); *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d at 1075. The ordinance, if allowed to take effect, would condition the Plaintiff's exercise of their First Amendment freedoms on the receipt of a license, and would prohibit them from exercising this right without a license. It is well-established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Defendants have urged this Court to find that there is no immediate irreparable injury because operators do not even have to file an application until March of next year, and although entertainers must file their applications by November 15th of this year, the board will not rule on their applications until, at the earliest, fifty days later. However, in the case of entertainers, the mere fact that they have to file an appliation infringes on their First Amendment freedoms, since the application requires them to submit a picture, a list of prior employers, prior addresses, and prior convictions of a sexual nature or involving moral turpitude. Furthermore, since the ordinance is already in effect, operators are already subject to it and live under the threat of having to submit licenses to the board. The Court finds that this is sufficient immediate irreparable harm for it to enjoin the provisions of the ordinance relating to operators.

### C. Public Interest

The Court finds that the issuance of an injunction at this point would be in the public interest: it "is always in the pubic interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Although it is also in the public interest to ameliorate the harmful side effects that sexually-oriented businesses may promote, as specified in the preamble to the ordinance, it is not in the public interest to do this through a statute that violates an individual's First Amendment rights.

### D. Possibility of Substantial Harm to Others

There is very little possibility of substantial harm to others if the injunction is not issued. Although the ordinance is directed at curtailing certain crimes and health hazards which are the "secondary effects of adult entertainment establishments," *see* Bill No.097-796, there are other means of regulating these effects that will continue to operate while the injunction is in effect, for example, the police and fire departments.

## III. CONCLUSION

The Court finds that the ordinance must be enjoined in its entirety because it fails to maintain the status quo while an initial determination of the board is pending, and does not provide for prompt judicial review. Although the ordinance is severable, § 56.54.170, the fact that it fails to provide expeditious judicial review requires the Court to invalidate it in its entirety, as none of the provisions are salvageable. Accordingly, the Metropolitan Government of Nashville and Davidson County Tennessee, and Emmett Turner, Chief of Police, are enjoined from enforcing any of the provisions of this ordinance until otherwise directed by this Court.

An order consistent with this memorandum will be filed contemporaneously.

Entered this the 5th day of December, 1997.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.

No. 3:97-1066
Chief Judge Nixon

## ORDER

(Entered December 8, 1997)

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby ORDERS that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly.

After reviewing the record, the Court finds that the Plaintiffs' Motion for a Preliminary Injunction should be GRANTED. It is ORDERED that the Defendants, Metropolitan Government of Nashville and Davidson County, and Emmett Turner, Chief of Police, are hereby prohibited from enforcing any of the provisions of Chapter 6.54 of the Nashville and Davidson County, Tenn. Code of Laws until otherwise directed by the Court.

It is so ORDERED.

Entered this the 5th day of December, 1997.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. a Tennessee Corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation, THE PLEASURE PALACE, INC. a Tennessee corporation; CAROUSEL AMUSEMENT CENTER, INC., a Tennessee corporation; DAWN PIERCE and ELIZABETH MARTZ, individually,

Plaintiffs,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMITT TURNER, Chief of Police of the Metro Police Department

Defendants.

and

CIVIL ACTION NO.
3-97-1066

JUDGE NIXON

MAGISTRATE JUDGE
GRIFFIN

JERRY C. PENDERGRASS,
THE 822 CORPORATION,
and 421 CORPORATION,

Plaintiffs,

CIVIL ACTION NO.
3-97-1176

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Defendant.

---

## CASE MANAGEMENT ORDER

(Entered March 5, 1998)

---

Pursuant to Rule 11(d) of the local rules of this Honorable Court, the following is adopted as the Case Management Plan.

1. Service of process has been completed in Civil Action No. 3-97-1066 and the return filed with the Clerk.

2. Answers have been filed on behalf of both Defendants in Civil Action No. 3-97-1066.

3. Limited discovery will be needed in the following areas:

a. Legislative history of the debate and ultimate enactment of Metropolitan Ordinance No. 097-796.

b. Documents, studies or other evidence filed with the Metropolitan Council or any committees thereof relating to its consideration of Metropolitan Ordinance No. 097-796, including secondary effects of adult entertainment establishments and any nexus between the Ordinance and perceived secondary effects.

c. Discovery by way of oral deposition and/or written interrogatories as to any and all members of the Metropolitan Council, or the staff thereof or of the Metropolitan Government having knowledge about any documents, studies or other information received by them concerning Metropolitan Ordinance No. 097-796, as finally adopted, or any of the earlier forms or previous amendments thereto.

d. Defendants will oppose any attempt to take discovery from individual members of the Metropolitan Council or its staff. Defendants will likely take the depositions of the individual plaintiffs, and representatives of the corporate plaintiffs. Defendants may additionally seek written discovery.

4. There are no prospects for settlement of this litigation in that it is a matter involving constitutional interpretation of Metropolitan Ordinance No. 097-796 which Plaintiffs have alleged imposes regulations which are in violation of their constitutional rights which could only be remedied by modification or repeal of the Ordinance by the Metropolitan Council, or by action of this Court.

5. The parties see no need for adopting special procedures as suggested in Local Rule 11(d)(5).

6. (a) The constitutional issues presented in this case are whether Metropolitan Ordinance No. 097-796 violates free speech provisions of state and federal constitutions, violates equal protection provisions of state and federal constitutions and whether said Ordinance violates

due process. Other issues will be Plaintiff's attorneys' fees and the standing of Plaintiffs to the extent challenged by Defendants.

(b) Potential witnesses are all members of the Metropolitan Council and Police Chief Emmett Turner; the Plaintiffs, their employees and corporate representatives of the corporate entities and potential expert witnesses.

(c) The parties will endeavor to agree upon procedures regarding the authenticity of documents that will avoid unnecessary discovery or proof.

(d) Another case challenging the constitutionality of Metropolitan Ordinance No. 097-796, styled *Jerry C. Pendergrass, et al. vs. Metropolitan Government of Nashville and Davidson County*, Civil Action No. 3:97-1176 has been filed in this Court and was assigned to Judge Nixon, who, by order of December 5, 1997, has ordered that the two cases be consolidated and found that the Motion to Intervene in this cause by the Plaintiffs in Civil Action No. 3:97-1176 is now moot. Accordingly, the Plaintiffs in Civil Action No. 3:97-1176 shall be subject to this Case Management Order and Metropolitan Government of Nashville and Davidson County shall timely file its answer or other pleading in response to the Complaint in Civil Action No. 3:97-1176.

(e) Following appropriate discovery, it is anticipated that this case may well be one which would be suitable for determination by Motion for Summary Judgment.

(f) Any subsequent Case Management Conferences may be requested by any party.

(g) Other than discovery disputes, the parties are not willing to consent to proceed before the Magistrate Judge for any other part of the proceedings.

7. The jurisdiction of the Court is invoked under 28 U.S.C. § 1331, § 1343(3), 42 U.S.C. § 1983, 28 U.S.C. § 2201, 42 U.S.C. § 1988 and Rule 57 of the Federal Rules of Civil Procedure. The Court's jurisdiction is not disputed.

8. It is the theory of the Plaintiffs that Ordinance No. 97-097-796 is unconstitutional on its face, and as applied to Plaintiffs, all of whom are either adult oriented establishments as regulated in said Ordinance, or are associated with such adult oriented establishments as alleged in the Complaint, and that they are entitled to injunctive and declaratory relief respecting the enforcement of said Ordinance. It is the theory of the Defendants that the Ordinance is not unconstitutional, and that the constitutional rights of Plaintiffs are not adversely effected thereby.

9. (a) As yet, no issues in this case have been resolved. Those remaining to be resolved are the constitutionality of the Ordinance in question and the Plaintiff's entitlement to attorneys' fees.

(b) The parties, at this juncture, see no need to file counter-claims, cross-claims or third party claims to join additional parties or to have the matter certified as a class action.

~~10. Discovery shall be completed by May 4, 1998. Motions for Summary Judgment shall be filed by June 22, 1998 and replies to such Motions by July 13, 1998. Any Motions relating to the sufficiency of discovery or compliance with the Federal Rules permitting discovery shall be~~

~~filed between May 4, 1998 and June 22, 1998, but may be sooner filed as circumstances may require. Any motions to Amend Pleadings shall be filed by May 15, 1998. If necessary, the matter should be scheduled for trial in the latter part of 1998.~~ [JG]

/s/ Juliet Griffin
MAGISTRATE JUDGE
JULIET GRIFFIN

DATE: ________________

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, INC., et al. | ) | No. 3-97-1066 |
| | ) | Consolidated with |
| v. | ) | No. 3-97-1176 |
| | ) | |
| METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al. | ) | |

## ORDER

(Entered March 6, 1998)

The initial case management conference was held on December 1, 1997, after which the parties submitted a proposed case management order, which is contemporaneously entered, except that the deadlines set forth in ¶ 20 of such proposed order were modified during the case management conference held on March 3, 1998, and the following deadlines were established:

1. All written discovery shall be served by April 4, 1998, and responded to by May 4, 1998.

2. All depositions shall be completed by September 30, 1998.

3. All discovery motions shall be filed by October 15, 1998.

4. All motions to amend the pleadings shall be filed by October 15, 1998.

5. All dispositive motions shall be filed by November 16, 1998.

6. Responses to dispositive motions shall be filed by December 18, 1998.

No other filings in support of or in opposition to any dispositive motion shall be filed except with the express permission of the Honorable John T. Nixon, Chief Judge.

The defendants indicated that they may file a motion to dissolve the preliminary injunction (Docket Entry No. 23), because of the amendments to the ordinance in question. In that event, the plaintiffs advised that they anticipated filing not only a response but a motion for preliminary injunction on other grounds. The plaintiffs advised that they anticipated needing the responses to written discovery and approximately two depositions prior to filing such a response and motion.

There shall be no stay of discovery pending the resolution of any motion to dissolve the preliminary injunction. The plaintiffs shall have the right to seek additional time beyond the normal 10 working days to respond to any such motion and to file their own cross motion to enable them to take necessary discovery.

The plaintiffs advised that they may move to amend their pleadings in the near future, inter alia, to add new "headliner" plaintiffs. The plaintiffs shall confer with the defendants prior to filing any motion to amend to determine if there will be opposition to any such motion to amend and, if not, the parties shall submit an agreed order allowing any such amendment.

Within three (3) days after the defendants file a motion to dissolve the preliminary injunction and after counsel have consulted with each other, counsel shall schedule a telephone conference call with the Court to address a briefing schedule for the response and cross motion, and any discovery necessary prior to filing such response and cross-motion.

It is so ORDERED.

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., )
et al. ) No. 3-97-1066
) Consolidated with
v. ) No. 3-97-1176
METROPOLITAN GOVERNMENT )
OF NASHVILLE AND DAVIDSON )
COUNTY, TENNESSEE, )
et al. )

## ORDER

(Entered September 16, 1998)

On August 19, 1998, counsel for the parties convened a telephone conference call with the Court, at which time the following matters were addressed:

1. The plaintiff's motion for modification of the previously entered discovery schedule (Docket Entry No. 30) is now MOOT, and the Clerk is directed to terminate that motion as pending.

2. Plaintiffs' counsel advised that discovery responses to the defendants' outstanding discovery were in the mail and the remainder of the responses would be sent to defendants' counsel the week of August 21, 1998.

3. Plaintiffs shall provide to defendants' counsel by facsimile a request for designation of Rule 30(b)(6) witness(es) by August 28, 1998.

4. The plaintiffs shall have until August 28, 1998 to move to extend their time to respond to the defendants' motion to dissolve (Docket Entry No. 39) the preliminary

injunction and to continue the September 21, 1998, hearing on the motion to dissolve.

5. The defendants shall have until September 18, 1998, to respond to the plaintiffs' request for Rule 30(b)(6) designation(s), including any objections, and to file a motion for a protective order. Such responses and motion shall be delivered to plaintiffs' counsel by facsimile.

6. The plaintiffs shall respond to any such motion for a protective order by September 28, 1998.

A telephone conference call with the undersigned is hereby scheduled for Thursday, October 1, 1998, at 2:00 p.m. to address any disputed issues regarding plaintiffs' request for discovery prior to responding to the pending motion to dissolve the preliminary injunction and/or the defendant's anticipated motion for a protective order. Although not specifically addressed on August 19, 1998, defendants' counsel shall initiate the conference call.

Although the defendants contend that the plaintiffs should not need any discovery to respond to the pending motion to dissolve the preliminary injunction or any discovery prior to the scheduled hearing, if any such discovery is permitted, a resolution of that issue will not occur until October 1, 1998, at the earliest (after consideration of the motion for a protective order to be filed by September 18, 1998, and the response to be filed by September 28, 1998), which will be after the hearing which is now scheduled for September 21, 1998.

It is so ORDERED.

/s/ Juliet Griffin
JULIET GRIFFIN
United States
Magistrate Judge

---

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, INC., et al.<br>v.<br>METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al. | ) | No. 3-97-1066<br>Consolidated with<br>No. 3-97-1176 |

## ORDER

(Entered October 22, 1998)

In accordance with the memorandum contemporaneously entered, the defendants' motion for a protective order (Docket Entry No. 48) is GRANTED in all respects, except it is DENIED as to Request 32.

The defendants shall permit the plaintiffs to inspect documents responsive to this request. The defendants shall not, however, be required to compile or categorize any such documents. By so ruling, the Court assumes that the defendants maintain records of calls made to report criminal activity, incident reports, or other such documentation of complaints. If such documents are not maintained by type of business or by the time of such complaints, the defendants shall not be required to categorize such documents.

It is not clear to the Court the time period for which the plaintiffs seek the requested information. The plaintiffs shall advise the defendants of the relevant time period, and when they intend to inspect such documents. If any dispute arises regarding such inspection, counsel shall arrange a telephone conference call with the undersigned to address such dispute.

Any party desiring to appeal this order may do so by filing a motion for review no later than ten (10) days from the date of service of this order. The motion for review must be accompanied by a brief or other pertinent documents to apprise the District Judge of the basis for the appeal. *See* Rule 303(f) of the Local Rules for Magistrate Proceedings.

It is so ORDERED.

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, )
INC., et al )
)
v. )
)
THE METROPOLITAN )
GOVERNMENT OF )
NASHVILLE AND DAVIDSON )
COUNTY, et al. ) No. 3-97-1066
and ) Consolidated with
)
JERRY C. PENDERGRASS, ) No. 3-97-1176
et al., )
v. )
)
THE METROPOLITAN GOV- )
ERNMENT OF NASHVILLE )
AND DAVIDSON COUNTY, et al. )

## MEMORANDUM

(Entered October 22, 1998)

The underlying dispute in this matter pertains to the constitutionality of the recently amended ordinance designed to license and regulate adult entertainment and adult businesses, Chapter 6.54 of the Metropolitan Code of Laws, and the extent of discovery which should be allowed at this stage of the proceedings. Plaintiffs' motion for preliminary injunction based upon the lack of prompt judicial review was granted by order entered December 8, 1997 (Docket Entry No. 23). The defendants subsequently filed a motion to dissolve the preliminary injunction which is currently pending before the Court (Docket Entry No. 34). Prior to filing a response to the defendants' motion or filing a second motion for preliminary injunction, the plaintiffs served upon defendants, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, a notice of deposition outlining 39 topics about which they seek documents and testimony (Docket. Entry No. 42). The defendants have filed the instant Motion for a Protective Order (Docket Entry No. 48) asking the Court to limit the plaintiffs' requests for discovery.

The ordinance at issue explicitly states in its preamble that its provisions have "neither the purpose nor effect of imposing limitations or restrictions on the content of any communicative materials, including sexually oriented materials or entertainment," but rather that its regulation of "adult entertainment establishments" is designed to "promote the health, morals, and general welfare of the citizens." *See* Preamble, Ch. 6.54 of Metropolitan Code (Docket Entry No. 49, Def. Response to Request No. 34). The cited evidence relied upon by the Metropolitan Council to make its specific findings of adverse secondary effects which the ordinance seeks to regulate includes studies, judicial opinions, newspaper articles, and reports from the Police Department and the Department of Health of the Metropolitan Government of Nashville and Davidson County outlining a variety of "unlawful and unhealthy activities which occur within adult establishments." *See* Findings, Ch. 6.54 of Metropolitan Code.

In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440. 49 L.Ed.2d 310 (1976), the constitutionality of zoning ordinances differentiating between "adult" movie theaters which exhibited sexually explicit "adult" movies and other theaters was considered by the Court. Summary judgment in favor of the defendants by the District Court was reversed by the Court of Appeals for the Sixth Circuit which, reasoning that the ordinance imposed a prior restraint on constitutionally protected communication, held the ordinance invalid under the Equal Protection Clause. *American Mini Theaters, Inc. v. Gibbs*, 518 F.2d 1014 (6th Cir. 1975). The Supreme Court reversed, holding that zoning ordinances designed to combat the undesirable secondary effects of businesses which purvey sexually explicit materials are to be reviewed under the standards applicable to "content neutral" time, place, and manner regulations. Writing for the plurality, Justice Stevens observed that, because the zoning ordinances sought to avoid the secondary effects and not the dissemination of "'offensive' speech,'" a city was entitled to distinguish between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication." 427 U.S. at 70-71.[1]

In *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.29 (1985), the Court again considered the constitutionality of a zoning ordinance which regulated adult motion picture theaters. In that case, to prevent crime, protect retail trade, maintain property values and generally protect and preserve the quality of the city's neighborhoods, commercial districts and quality of urban life, a Seattle suburb enacted an ordinance prohibiting adult movies theaters within 1000 feet of any residential zone, church, park, or school. The plaintiffs sought a declaratory judgment that the ordinance was in violation of the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court entered a preliminary injunction against enforcement of the ordinance. Shortly thereafter, the parties agreed to submit the case for a final decision on whether a permanent injunction should issue on the basis of the record already developed. The District Court determined that the city was not required to show specific adverse impact from the operation of adult theaters but could rely upon the experiences of other cities and held that the ordinance did not substantially restrict First Amendment interests.

---

[1] Justice Powell, in concurrence, elaborated: "[the] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings." 427 U.S. at 82 n.6.

The Court of Appeals for the Ninth Circuit concluded that the ordinance substantially restricted First Amendment interests and reversed, finding "Renton's justifications conclusory and speculative" because the city "has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton." *Playtime Theaters, Inc. v. City of Renton,* 748 F.2d 527, 537 (9th Cir. 1984). The Supreme Court, however, found that the ordinance was "completely consistent with our definition of 'content-neutral' speech regulations as those that are justified without reference to the content of the regulated speech." 475 U.S. at 48 (citations omitted). Noting that the Ninth Circuit had "imposed on the city an unnecessarily rigid burden of proof," the Court held that Renton was "entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in [*Northend Cinema, Inc. v. Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978)], in enacting its adult theater zoning ordinance." 475 U.S. at 51. The Court stated further "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52.

In a decision composed of four opinions, the Court upheld a public indecency statute requiring nude dancers to wear pasties and g-strings in *Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Chief Justice Rehnquist, writing for the plurality, applied the four-part test developed in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968) ("a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"), and found that the statute furthered a substantial government interest in protecting order and morality, and that the statute was sufficiently "narrowly tailored" to survive constitutional scrutiny. 501 U.S. at 572. Justice Scalia concurred in upholding the statute, but rejected the contention that nude dancing is entitled to First Amendment protection. In his concurring opinion, Justice Souter, basing his application of *O'Brien* on assumptions previously relied upon in *Renton,* agreed that nude dancing is entitled to First Amendment protection but disagreed as to the interest justifying restriction of First Amendment rights. Justice Souter stated:

> In light of *Renton's* recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's 'bookstore' furthers its interest in preventing prostitution, sexual assault, and associated crimes. . . . I do not believe that the state is required affirmatively to undertake to litigate this issue repeatedly in every case.

501 U.S. at 584.

The Sixth Circuit followed the line of reasoning enunciated by Justice Souter in two cases, *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (considering constitutionality of ordinance regulating adult-oriented businesses), and *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (considering city public indecency ordinance). Based on Justice Souter's opinion, the Sixth Circuit stated that "requiring affirmative evidence of a secondary effects motivation . . . imposes a burden on the city that Justice Souter's opinion seems designed to avoid." *Triplett Grille*, 40 F.3d at 135. Notably, the Court applied this language in a case considering the constitutionality of a Chattanooga ordinance which, like the one at issue in this case, regulates adult-orien businesses. The Court adopted Justice Souter's reasoning:

> Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. . . . [L]egislation seeking to combat

> the secondary effects of adult entertainment need not await localized proof of those effects.

*DLS*, 107 F.3d at 411 (citing *Barnes*, 501 U.S. at 582-84). The Court went on to explicitly overrule prior Sixth Circuit authority which held that the government must show that the legislature actually relied on evidence of secondary effects. 107 F.3d at 411.

Considering the plaintiffs' discovery requests in light of prospective relevant issues and the current procedural status of the case, the Court grants the defendants' motion for a protective order in significant part and makes the following specific rulings.

### Requests 1-4, 20, 34, and 37

Requests 1 and 2 pertain to "the initial proposal of and subsequent drafting, revisions, adoption, and enactment" of the ordinance. Requests 3 and 4 seek "any and all documents submitted to the Metropolitan Government of Nashville and Davidson County regarding, concerning, related to, or in furtherance of the initial proposal of an subsequent drafting, revisions, adoption and enactment" of the ordinance. Request 20 pertains to the creation and appointment of persons to the "Sexually Oriented Business Licensing Board." Request 34 pertains to the identities of each and every "sexually oriented business/establishment" located within Davidson County. Request 37 pertains to the method by which the licenses and permit fees and the applicable renewal fees were determined.

By Defendants' Reply to Plaintiffs' Response to Motion for a Protective Order (Docket Entry No. 53) the defendants have advised that they will make available a deponent to testify regarding these items.

## Requests 5-17[2], 24-29, and 33

Requests 5 and 6 seek any and all documents relied upon "regarding, concerning, related to or in furtherance of the initial proposal of and subsequent drafting, revisions, adoption, and enactment" of the ordinance. Requests 7 and 8 pertain to "each and every governmental interest meant to be furthered" by the ordinance. Requests 9 and 10 pertain to the "purpose and intent behind" the ordinance. Requests 11 and 12 pertain to "the manner by which the provisions of [the ordinance] further the governmental interests described in requests 7 and 8." Requests 14-17 pertain to the "manner or method by which documents as referenced in requests [3-6] above establish that [the provisions of the ordinance] will in fact further the governmental interests as referenced in [requests 7 and 8] above." Requests 24 seeks a deponent to testify about how the evidence, materials, studies, judicial opinions, reports and articles referenced in the "findings" section of the ordinance relate to the additional findings in the ordinance, the necessity of the ordinance provisions, and how the provisions of ordinance "further any of the governmental interests referenced to in requests 7 and 8 above." Request 25 seeks a deponent to testify as to the basis for each of the preambles and findings in the ordinance. Request 26 seeks a deponent to testify regarding "any and all documents and information utilized, relied upon, or referenced in preparing the preambles and findings in the ordinance." Requests 27 and 28 seek a deponent to testify as to "why the findings support the enactment of each and every provision of the ordinance." Requests 29 seeks a deponent to testify as to "[a]ny further preambles or additional findings (not limited as to the definition of this word as set forth above) associated with any purpose for the enforcement or interpretation" of the ordinance. Request 33 seeks a deponent to testify as to information regarding enactment and enforcement of any similar law which establishes the same type of provisions to further the same government interests as the ordinance.

---

[2] There is no Request 13 in the plaintiffs' list of requests.

The defendants state that the documents "relied upon" by the Metropolitan Council have been provided to the defendants. They argue, however, that providing a witness to be deposed on the topics outlined in Requests 5-17, and 24-29 is superfluous and irrelevant because those issues are legal determinations to be made by the Court and no purpose is served for a government employee to testify as to his or her opinion on the issue. The defendants assert that Request 33 pertaining to similar laws seeks purely a legal conclusion which a Rule 30(b)(6) deponent would be unqualified to give, is irrelevant to the issues in this litigation, calls for information protected from disclosure by legislative privilege, and is too vague to answer.

The plaintiffs assert that it is the defendants' burden to establish the causal connection between the asserted governmental interest and the ordinance and the Court's duty to ascertain whether the stated purpose of the legislation and asserted justification is the "real" reason for enacting such a law. Based on this interpretation of the law, the plaintiffs argue that the evidence sought from a designated Rule 30(b)(6) deponent is relevant and discoverable.

The plaintiffs' argument is not persuasive in light of the very clear language to the contrary in *Barnes, DLS, Inc.*, and *Triplett Grille*. Moreover, it is undisputed that the doctrine of legislative immunity is applicable to the motives of city council members in enacting the legislation underlying the current dispute, *see Schiltz v. Commonwealth of Virginia*, 63 F.3d 295, 303 (4th Cir. 1995); *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988), and, unless the privilege is explicitly waived, city council members cannot be required to testify regarding their conduct in their legislative capacity. *See Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S.Ct. 1425, 1427, 18 L.Ed.2d 577 (1967); *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 299 (D. Md.1992). Although this testimonial immunity has been extended to preclude discovery of the personal notes and files of city council members, *Simpson v. City of Hampton, Va.*, 166 F.R.D. 16, 18 (E.D.Va. 1996), "documents created by legislative activity can, if not protected by any other privilege, be disclosed and used in a legal dispute that does not directly involve those who wrote the document, i.e., the legislator or his aides." *Corporacion Insular de Seguros v. Garcia*, 709 F.Supp. 288, 297 (D.P.R. 1989). Thus, a defendant will be required to produce at the request of a plaintiff, any documents that were prepared by a committee during the course of its deliberations. *Marylanders for Fair Representation, Inc v. Schaefer*, 144 F.R.D. at 302 n.20 (D. Md. 1992). The defendants have provided the documents relied upon by the Metropolitan council. The plaintiffs are not entitled to the testimony requested. Accordingly, the defendants motion for a protective order is granted with respect to Requests 5-17, 24-29, and 33.

**Requests 18 and 19**

Requests 18 and 19 ask for a deponent to testify regarding definitions and interpretations of ordinance provisions which are undefined. The Court agrees with the defendants as that, if the plaintiffs cannot determine the meaning of terms within the ordinance, they may challenge them on legal grounds and the Court may make a decision on the legal issue of whether such "undefined terms" render the ordinance unconstitutional. Accordingly, no discovery is necessary on this issue and the defendants' motion for a protective order is granted as to Requests 18 and 19.

**Requests 21-23 and 35**

Request 21 asks for a deponent to testify regarding the purposes and reason underlying any rules, policies, or procedures adopted by the Sexually Oriented Business Licensing Board. Request 22 asks for a deponent to testify regarding the provisions of, definitions applicable to, and interpretation of any an all rules, policies or procedures considered or enacted by the Sexually Oriented Business Licensing Board. Request 23 seeks a deponent to testify as to "[w]hat, if any" effect zoning provisions in the Metropolitan Code related to sexually oriented business/establishments have had "on any perceived adverse secondary effects engendered by such businesses." Request 35 seeks a deponent to testify to the public disclosure policies and requirements regarding information supplied by license and permit applicants and their agents and representatives pursuant to the provisions of the ordinance.

The relevancy of such testimony to the constitutionality of the ordinance is questionable and, in any case, such a request is premature as this stage of the proceedings. Accordingly, the defendants' motion for a protective order is granted with regard to Requests 21-23 and 35.

## Requests 30 and 31

Requests 30 and 31 seeks a deponent to testify as to "[a]ny and all documents prepared for the enforcement or interpretation of the ordinance." The defendants, interpreting this as a request for the license and application forms, state that the plaintiffs have been provided with copies of the prospective forms.

If the requested information is reasonably related to the stated purpose of the ordinance, the use of the application forms is constitutional. The Court finds the relevance of testimony concerning the creation of the forms tangential to the constitutionality of the ordinance and certainly premature at this stage of the proceedings. Accordingly, the defendants' motion for a protective order is granted as to requests 30 and 31.

## Request 32

Request 32 seeks "[c]riminal statistics and other records or information evidencing incidents of all criminal activity at or in the areas near businesses in Davidson County which are open and attract customers either on a 24 hour basis or during the hours between 2:00 a.m. and

6:00 a.m. on weekdays and between the hours of 3:00 a.m. and 12:00 noon Sundays."

In response, the defendants assert that no criminal statistics, other records, or information responsive to this request exists. The Court questions this broad assertion, however. Although such information may not exist in a compiled form, it can be assumed that the defendants have access to raw data pertaining to criminal activity in Davidson County.

The Court assumes that such information is requested to refute the findings based on evidence from other jurisdictions as to the proliferation of crime engendered in the vicinity of sexually-oriented businesses and establishments. Although the Court held in *Renton* that a city was not required to produce its own studies as to the secondary effects and could rely on evidence produced in other cities, it did not address the issue of whether the plaintiff is entitled to rebut the defendants' non-localized evidence. The cases addressing this issue were decided on the evidence before the Court on summary judgment, which apparently did not include localized evidence contrary to the evidence relied upon in other locales. Although it is not the province of the undersigned to determine whether the plaintiffs will be entitled to put on proof to rebut the non-localized evidence, the issue will never be reached if the plaintiff is foreclosed at this stage in the proceedings from gathering the raw data upon which to make such an argument. Accordingly, the plaintiff should be afforded the opportunity to inspect this raw data, which might rebut the evidence relied on from other locales.. Accordingly, the plaintiff should be given access to the relevant criminal report data. The defendant's motion for a protective order is denied with respect to Request 32.

## Request 33

Request 33 seeks information regarding the enactment and enforcement of similar laws which establish the type of provision found within the ordinance "thereto to further the government interests discussed in requests 7 and 8 above." The defendants assert that this request seeks a purely legal conclusion which a Rule 30(b)(6) deponent would be unqualified to give, is irrelevant to the issues in this legislation and calls for information regarding legislators motives which is protected from disclosure by legislative privilege, and is too vague to answer because what constitutes a "similar" law is open to interpretation. To the extent that Request 33 (which the Court finds vague and amorphous) can be deciphered, the Court agrees with the defendants that it seeks information regarding legislators' motives and, as previously discussed, this information is barred from discovery. Accordingly, the defendants' motion for a protective order is granted as to Request 33.

## Requests 36

Request 36 seeks a deponent to testify as to other businesses operating in Davidson County and other individuals required to disclose and provide the information required by the ordinance in order to obtain a license or permit. The defendants assert that, as no other business or individuals are required to make the identical disclosure, there are no responsive documents available. Defendants' motion for a protective order is granted as to Request 36.

## Request 38

Request 38 seeks a deponent to testify requiring closing hour requirements for business licensed by the Metropolitan Government of Nashville and Davidson County. Plaintiffs can consult the Metropolitan Code of Law to find this information. Defendants' motion for a protective order is granted as to Request 38.

## Request 39

Plaintiffs seek a deponent to testify to any and all documents in their Request for Production of Documents. The defendants assert that the documents speak for themselves and that they should not be put to the burden of producing deponents to testify generally regarding these documents which were obtained from a variety of sources. To the extent that this broad request can be distinguished from the Requests 1-38 and the separate rulings made in conjunction with each of those requests, the Court agrees with the defendants that, at this stage in the proceedings, the defendants should not be required to produce a Rule 30(b)(6) deponent to testify to the documents produced as a result of the plaintiffs Request for Production of Documents. Accordingly, the defendants' motion for a protective order is granted as to Request 39.

An appropriate order will enter.

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate
Judge

---

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION*

DEJA VU OF NASHVILLE, )
INC., et al. ) No. 3-97-1066
) Consolidated with
v. ) No. 3-97-1176
METROPOLITAN GOVERN- )
MENT OF NASHVILLE )
AND DAVIDSON COUNTY, )
TENNESSEE, et al. )

## ORDER

On October 28, 1998, a hearing was held upon the parties' request, at which time the following matters were addressed:

1. The deadline for the plaintiffs to respond to the defendants' pending motion (Docket Entry No. 34) to dissolve the preliminary injunction is extended to November 2, 1998. Such response shall be transmitted by personal delivery or facsimile to defendants' counsel by 11:00 a.m., C.S.T. (Nashville time).

2. Any reply to such response shall be filed by the defendants, if necessary, by November 4, 1998, and a copy transmitted by facsimile to plaintiffs' counsel.

3. The defendants announced that they agreed to extend the grace periods for the business plaintiffs and the individual plaintiffs to 120 days and 45 days, respectively,

---

* Any typographical and/or incorrect punctuation found in the following pages were intentionally left to show accurately how the original documents appeared.

from the date of entry of any order granting the defendants' pending motion to dissolve the preliminary injunction for such plaintiffs to make application for a license under the amended ordinance, and that none of the ordinance provisions will be effective against the plaintiffs nor will any action be taken against the plaintiffs for their non-compliance with the ordinance during the grace period as set forth above.

4. After the entry of any order granting the defendants' pending motion to dissolve the preliminary injunction, the plaintiffs shall have 10 working days to file a supplemental motion for preliminary injunction, in which all issues upon which the plaintiffs relies in this case shall be raised.[1] Although the parties and the Court had originally, by prior scheduling orders, contemplated that the plaintiffs' second motion(s) for preliminary injunction would be heard at the same time as the defendants' motion to dissolve the injunction, after further consideration, it appears that it would be more efficient to delay consideration of any second motion for preliminary injunction until after the resolution of the defendants' pending motion to dissolve the preliminary injunction.[2]

5. The deadline for filing all dispositive motions (except motions for injunctive relief) shall be extended, and an extended deadline determined after the resolution of the defendants' motion to dissolve the preliminary injunction, if denied, or after the plaintiffs' anticipated

---

[1] In other words, the plaintiffs shall not piecemeal motions for preliminary injunction but shall raise all grounds in support of a motion for preliminary injunction at one time.

[2] Specifically, if the Court were to deny the motion to dissolve, there would be no need for a second motion for preliminary injunction.

second motion for preliminary injunction, if the motion to dissolve is granted.

6. As a result of the agreement reached among the parties, the plaintiffs' motion to continue (Docket Entry No. 57) the hearing scheduled for November 5, 1998, was WITHDRAWN, and the Clerk is directed to terminate that motion.

7. As a result of the scheduling matters addressed above, the defendants WITHDREW their motion to grant the defendants' motion to dissolve based on the plaintiffs' failure to file a response or to clarify the scope (Docket Entry No. 59), and the Clerk is directed to terminate that motion as pending.

8. Plaintiffs' counsel shall call the office of the undersigned within five (5) days of the resolution of the pending motion to dissolve the injunction[3] and, if the motion is granted, within five (5) days of the resolution of the plaintiffs' anticipated second motion for preliminary injunction.

It is so ORDERED.

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate Judge

---

[3] If the motion is denied, further proceedings will be scheduled, and deadlines established for filing dispositive motions. If the motion is granted, specific deadlines for the plaintiffs to file a supplemental motion for preliminary injunction and for briefing on such motion will be established.

THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC.,
et al.

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,

and

JERRY C. PENDERGRASS, et al.,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.

No. 3:97-1066
Judge Nixon
Magistrate
Judge Griffin

Consolidated Cases

No. 3:97-1176
Judge Nixon
Magistrate
Judge Griffin

## MEMORANDUM

(Entered December 3, 1998)

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No. 63)[1] Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons set forth below, Defendant's motion is GRANTED and the preliminary injunction imposed in this case is hereby dissolved.

---

[1] Plaintiffs have filed both a Response (Doc. No. 63) and a Memorandum in support of their Response (Doc. No. 64). For the sake of brevity, the Court's citations to Plaintiffs' Response shall in actuality refer to Plaintiffs' Memorandum. (Doc. No. 64.)

## I. Background

This case revolves around Defendant Metropolitan Government of Nashville and Davidson County's (hereinafter Metro) Sexually Oriented Business Ordinance ("the Ordinance"). By Order dated December 8, 1997, this Court granted Plaintiffs' motion for a preliminary injunction based on the findings that the Ordinance as written did not sufficiently preserve the status quo, nor did it provide for sufficiently prompt judicial review. (Doc. No. 23.) Defendant has moved for the preliminary injunction to be dissolved now that the Ordinance has been amended, as has the State's writ of *certiorari* statute. (Def.'s Mem. at 2-3.) The Court held a hearing on November 5, 1998, during which time the parties had an opportunity to present evidence and argue their positions.

### A. The Enjoined Ordinance

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment. This Court enjoined a regulatory scheme enacted by the Metro Council which requires "sexually oriented businesses" to obtain licences before being permitted to operate and adult entertainers employed in these establishments to obtain permits in order to perform.[2]

---

[2] Again for the sake of brevity, the Court hereinafter will refer only to licenses sought by businesses since the issues at hand apply equally to license seekers as well as permit seekers.

The Ordinance as originally written specifically requires the operators of all "sexually oriented businesses," including bookstores, video stores, theaters, and nightclubs which "regularly present[] material or exhibitions distinguished or characterized by an emphasis on matter depicting . . . 'specified sexual activities' or 'specified anatomical areas'" to obtain licenses to operate issued by a specially established board ("the Board"). Tenn. Code Ann. §6.54.010(S). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams of booths, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 654.070A)(2). Operators who have been convicted or pleaded *nolo contendere* to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers employed in these businesses. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons, including discovery that an operator employs an entertainer who does not have a permit, or the furnishing of sexually explicit material to minors. §§ 6.54.100, 654.140.

Once the application is received, the Board must distribute a copy of the application "promptly" to the Police Department, the Department of Codes and Administration, the Health Department, the Fire Department, and the applicant. § 6.54.040(A)(1). These departments are required to conduct inspections and to provide reports to the Board within thirty days of receipt of the application. § 6.54.040(B)(3). The Board is then required to make its determination within twenty days of receiving these reports. § 6.54.040(C)(1). However, in certain circumstances, the Board may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The enjoined Ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the Board is required to schedule a hearing at its next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[3] The denial of a license is required to be mailed within ten days to the applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may be made directly to the Chancery Court. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. In addition, the Ordinance permits an applicant to appeal by filing a petition for writ of certiorari, in which case the Board must submit all records of the proceedings before it to the court within ten days. *Id.* The enjoined Ordinance makes similar provisions for the appeal of the denial of an entertainer's permit. However, in the case of entertainers, the board has only fifteen days to make its initial determination after receiving the reports from other agencies, although it may hold the application for an additional thirty days under specified circumstances. §§ 6.54.070(C)(1), (C)(5).

---

[3] The Board is required to meet twice a month. § 6.54.020(D)(1). Board Policy No. 10 dictates that the Board meet on the second and fourth Tuesdays of every month.

## B. The Amended Ordinance

### 1. Maintenance of the Status Quo

The amended Ordinance allows currently operating businesses to appeal adverse administrative decisions within 60 days, during which time the adverse decision is stayed. Furthermore, once the appeals process is initiated, the adverse decision is further stayed until the court upholds the decision after adjudication on the merits. § 6.54.040(E)(3). If the business or entertainer forgoes appeal, they may continue to operate until the 60 day period has expired. *Id.* An identical provision applies to individual permit applications. § 6.54.070(D)(3).

### 2. Prompt Review

#### a. *Administrative Determinations*

The administrative process, as amended, will be completed in 47 days. (Def.'s Mem. at 4). Upon submission of an application for a license, the Department of Codes Administration, the Fire Department, and the Health Department will inspect the business, and the Police Department will run a criminal background check on the applicant. § 6.54.040(B)(1). All of these departments must submit reports to the Board within 20 days of the filing of the application. *Id.* Failure to investigate or submit a timely report by any department will be construed as though the department approved the application. *Id.*

Once the Board has the reports, it must meet and deny or grant the application within 15 days. § 6.54.040(C)(1). Failure to meet or meeting without a quorum shall be treated as an approval of the application and the license will be mailed to the applicant. *Id.* If the Board meets on the 15th day and allowing one day to mail the result, the entire process will be complete in 47 days.[4] (Def. 's Mem. at 4.)

Upon denial of an application, the applicant can appeal to the Board for a full hearing or proceed to court. § 6.54.040(E)(1)-(2). The applicant has 5 days to appeal to the Board and the Board has 15 days to meet and hear the appeal. §6.54.040(E)(1)(a)-(b). An oral decision will be rendered at the hearing. § 6.54.040(E)(1)(d) Allowing one day to mail a written decision, the applicant may add an additional 21 days to the administrative process at his or her discretion.

### b. *Judicial Review*

Applicants can apply for a writ of *certiorari* in order to have the final decision of the Board reviewed since a procedure for review is not otherwise provided. Tennessee Code Annotated § 27-9-111, addresses the briefing and hearing schedule used in processing writs. The section has been amended as follows:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, *the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari*. When an expedited hearing

---

[4] Including a potential ten day extension for additional investigation into out-of-state records, if necessary. § 6.54.040(C)(8).

> is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven days of the grant of the writ of ***certiorari***.

(Emphasis added.) The statute thus now requires a decision within a mandated period of time for all First Amendment cases.

## II. Discussion

In order to determine the propriety of injunctive relief, the Court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1993) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well, *Planned Parenthood Ass'n v. McWherter,* 716 F. Supp. 1064, 1066 (M.D. Tenn. 1980); *cf. Performance Unlimited,* 52 F.3d at 1385-86 (quoting Merrill Lynch, Pierce, Fenner & Smith, 836 F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry upon the first factor, although it will also discuss the others in turn.

A. *Likelihood of Success on the Merits*

This Court enjoined the original Ordinance on two grounds: 1) the Ordinance failed to sufficiently maintain the status quo pending judicial review; and 2) the Ordinance did not provide for prompt judicial review. (Court's Mem. at 10-15.) Both of the grounds fell under the Court's analysis of the Plaintiffs' likelihood of success on the merits. *Id.*

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,'" as is the case here. *FW/PBS. Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland,* 38 U.S. 51, 58 85 S.Ct. 734 (1965). Specifically, the decision-maker must not be given unlimited discretion so as to risk suppression of protected speech. *FW/PBS,* 493 U.S. at 225026. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis,* 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief period of time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

1. Status Quo

Plaintiffs did not respond to Defendant's assertion that the amended Ordinance now provides for preservation of the status quo pending judicial review, (*See* Pls.' Mem.), as Defendant noted during oral argument. Upon review of the record and in light of Plaintiffs' failure to respond to this issue, the Court finds that the amended Ordinance does, in fact, provide for the maintenance of the status quo pending judicial review such that Plaintiffs are no longer likely to succeed on the merits of this particular issue.

2. Prompt Judicial Review

The Defendant argues that the amended Ordinance, together with the amended State stature regarding writs of certiorari, provide for prompt judicial review. The administrative determination will be complete within 47 days and the appeal process following adverse administrative decisions will be complete within 40 days. (Def.'s Mem. at 9.) The 47-day process is mandated by the timetable built into the Ordinance. The amended writ statute answers this Court's concern regarding the issuance of an opinion within a mandated period of time by requiring that all First Amendment cases be heard and decided within 40 days. (Def.'s Mem. at 7).

Defendant next points out that the 40-day period within which writ decisions regarding the First Amendment must be made is less than the impermissible 5 month delay cited in *East Brooks Books v. City of Memphis,* 48 F.3d 220

(6th Cir. 1995) (rehearing and suggestion for rehearing en banc denied May 5, 1995). Furthermore, though the case law does not indicate what specific time period would satisfy the "prompt judicial review" standard, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 373-74 (1971), determined that 60 days for the completion of judicial proceedings was sufficient to meet the standard. Thus, the period for completion of judicial review under the amended Ordinance sufficiently cures the enjoined Ordinance's flaw in not providing any meaningful period of time within which an opinion must issue, as well as meets the legal standard for "prompt judicial review."

The Defendant further notes that the Court cited approvingly to a case in its Memorandum granting the preliminary injunction in which a 90-day waiting period from the beginning to the end of the judicial proceedings was found reasonable. *Wolff v. City of Monticello,* 803 F. Supp. 1568, 1574 (D. Minn. 1992). The waiting period under the ordinance as amended is only 87 days – 47 for the initial determination and 40 for the judicial review. Finally, in the event that the court fails to rule within 40 days of the filing of the appeal, the license shall issue. Metropolitan Code § 6.54.150(A)(10).

Plaintiffs counter with three arguments. First, Plaintiffs contend that in the Sixth Circuit, "prompt judicial review" requires a prompt judicial *determination,* not merely access to review. (Pls.' Mem. at 3-4 citing *East Brooks Books, supra*) Second, the Ordinance still does not mandate a time by which a writ petition must be granted or denied. (Pls.' Mem. at 5.) Since courts determine their own dockets and the only remedy for tardiness is popular vote, the Ordinance cannot guarantee that a decision will be handed down by the court hearing the writ petition within a sufficiently "prompt" period of time. *Id.* Plaintiffs also contend that courts will not be bound by the 40-day period in which they are to hand down decisions since a similar statute requiring Judges in non-jury cases to render an opinion within 60 days was held to be directory, not mandatory. (*Id.* at 5-6, citing *Schaeffer v. Richard,* 43 Tenn. App. 205, 306 S.W.2d 340 (1956, *cert.* den. Tenn. Sup. Ct. 1957.) Finally, Plaintiffs argue that the granting of a writ petition is discretionary and provides for an extremely narrow scope of review even when granted. (*Id.* at 6-13.) Common law writs only allow a determination of whether the Board acted illegally, fraudulently, or beyond its jurisdiction. (*Id.* at 8.) Thus, Plaintiffs contend, the intrinsic correctness of the Board's decision can not be reviewed pursuant to a common law writ. (*Id.* at 6.)

The Court notes initially that Plaintiffs are correct in their assertion that the Sixth Circuit requires a prompt judicial determination in order to meet the "prompt judicial review" standard. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas,* 62 Brook. L. Rev., 1217, 1241-42. However, the Court disagrees with Plaintiffs that the State writ of *certiorari* statute as amended does not mandate a determination within a sufficiently prompt period of time. The statute clearly states that a decision must be handed down within 40 days of the court granting the writ of *certiorari.* Tenn. Code Ann. § 27-9-111. The Defendant has filed an affidavit from the Clerk and Master for the Chancery Courts of Davidson County in which she swears that "[g]enerally, our office processes all petitions for a writ of *certiorari* including presenting the proposed order and petition to a chancellor, docketing the signed order and issuing the writ of *certiorari* within two days of the filing of the petition." (Def.'s Exhibit D to Mot. at 2.) Thus, Plaintiffs' concern that the courts will not promptly determine whether or not to grant the writ petition is unfounded.

Plaintiff's second contention, that the courts will not be bound by the 40-day period, relies on reasoning from *Schaeffer v. Richard, supra.* The *Schaeffer* decision is distinguishable, however, since in that case, the legislature did not declare void decisions that were not rendered within the mandated 60-day period. *Id.* at 212. Thus, in that case there was no recourse if a decision was rendered outside of the "mandated" period. In the instant case, if a decision is not rendered within the 40-day period, then the license shall issue, thus a safeguard is in place against judicial tardiness. The legislature need not declare the tardy decision void, since the license shall issue and remain in effect until and unless the decision finally rendered revokes it. Therefore, this argument by the Plaintiffs also lacks merit.

As for Plaintiffs' contention that the granting of the writ is discretionary and that it is too narrow in scope to provide adequate judicial review, this Court notes that Plaintiffs admitted during oral argument that Defendant has done all that it can do within its power as Metro to make judicial review of Board determinations prompt. The Court is not convinced by Plaintiffs' argument that the amended statutory language of the State writ statute does not require that all First Amendment cases be heard, thereby causing a fatal flaw in the statute. Plaintiffs themselves argue that without a review under a writ of *certiorari*, applicants will have no basis for review of adverse decisions. The Tennessee Supreme Court has ruled, however, that common law writs should be granted where denial of the writ is "tantamount to the denial to either party of a day in court." *State v. Johnson,* 569 S.W.2d 808, 815 (Tenn. 1978) (Finding exceptions to the general rule that the common law writ does not permit review of the correctness of a judgment.). As for the scope of review, the state courts have determined that a violation of a constitutional standard falls within the definition of "illegal, arbitrary, or fraudulent" actions which are reviewable under common law writs. *Hoover, Inc. v. Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn.App. 1996.). Furthermore, "[u]nder the common law writ of certiorari, . . . [w]hether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court *upon an examination of the evidence introduced before the agency*." *Watts v. Civil Serv. Bd. for Columbia,* 606 S.W.2d 274, 276-77 (Tenn. 1980) (Emphasis added.) Thus, the Court finds that Plaintiffs are incorrect in asserting that the "intrinsic correctness" of the Board's decisions under the Ordinance cannot be reviewed.

Plaintiffs argued at the hearing that a mistake in documentation for an entertainer as to his or her age, for example, would not be reviewable under a writ of *certiorari.* The Court submits that such an error is easily remedied by providing the correct documentation to the Board via a corrected or even a completely new application. Furthermore, in the Court's Memorandum granting the preliminary injunction, the Court referenced a proposed rule from Defendants that was more vague than the language ultimately used to amend the Ordinance and stated that the rule was flawed in that it was merely a proposal, but that an enacted version of the rule is "exactly what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine." (Ct.'s Mem. at 15.) Defendant has come back to this Court with an amendment more specific than its proposed rule which mandates that decisions must be rendered by courts within an acceptable, specific period of time. Furthermore, the Ordinance now requires that a license issue if the judicial proceedings take longer than 40 days. This Court noted in its December 8, 1997 Memorandum that such a provision would meet the directives of the First Amendment. (*Id.*)

Based on the above analysis, this Court finds that Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits, as they could when the preliminary injunction was originally issued. Therefore, although analysis of the original Ordinance favored the Plaintiffs with respect to the other three factors since Plaintiffs established a substantial likelihood of success on the merits, that is no longer the case.

### B. Irreparable Harm

It is settled that non-obscene nude dancing is constitutionally protected activity within the scope of the First Amendment. *Barnes v. Glen Theaters. Inc.,* 501 U.S. 560, 565-66 (1991); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d at 1075. However, since prior restraint of the dancing is no longer a substantial threat, the Court finds that irreparable harm will not be caused if the Ordinance as amended goes into effect.

### C. Public Interest

Since the statute no longer presents a substantial possibility of infringing upon an individual's constitutional rights, the amelioration of the harmful side effects that sexually oriented businesses may promote is sufficient for this Court to find that this factor favors the Defendant.

### D. Possibility of Substantial Harm to Others

This Court has found that an individual's constitutional rights are no longer at substantial risk under the Ordinance; therefore, it follows that there is no risk of substantial harm to others if the injunction is lifted. Indeed, this Court would harm the autonomy of the legislative bodies of the State of Tennessee and the City of Nashville if it continued to enjoin this Ordinance having found that Plaintiffs lack a substantial likelihood of success on the merits. Thus, this factor favors Defendant's position, as well.

## III. Conclusion

The Court finds that the Ordinance as amended no longer presents substantial prior restraint problems since it provides for prompt judicial review of adverse decisions and the maintenance of the status quo while adverse decisions are appealed. Therefore, Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits and the preliminary injunction issued by this Court on December 7, 1997 is no longer justified. Accordingly, Defendant's motion to dissolve that preliminary injunction is GRANTED and the injunction is hereby dissolved.

An Order consistent with this memorandum will be filed contemporaneously.

Entered this the 1st day of December, 1998.

/s/ John T. Nixon
JOHN T. NIXON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC.,
et al.

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,

and

JERRY C. PENDERGRASS, et al.,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.

No. 3:97-1066
Judge Nixon
Magistrate
Judge Griffin

Consolidated Cases

No. 3:97-1176
Judge Nixon
Magistrate
Judge Griffin

## ORDER

(Entered December 3, 1998)

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No 63). Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons set forth in the accompanying memorandum, Defendant's motion is GRANTED and the preliminary injunction imposed in this case is hereby DISSOLVED.

It is so ORDERED.

Entered this the 1st day of December, 1998.

/s/ John T. Nixon
JOHN T. NIXON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

---

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al. ]
]
v. ] No. 3:97-1066
] No. 3:97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al. ] Judge Higgins

## MEMORANDUM

(Entered October 4, 1999)

The plaintiffs in this case are adult-oriented establishments, including adult cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, owners and operators of such establishments, and individual dancers who perform at such establishments. On August 19, 1997, the Council of The Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code, Bill No. 097-796. This Chapter, and subsequently enacted amendments to it, require "sexually oriented" businesses to obtain a license to operate and entertainers who perform in such establishments to obtain a permit.

The initial plaintiffs in this case, Deja Vu of Nashville, Inc.; Michael Rucker; Michael Butler; Meroney Entertainment, Inc.; The Pleasure Palace, Inc.; Carousel Amusement Center, Inc.; Dawn Pierce; and Elizabeth

Martez,[1] filed this action on October 17, 1997, against The Metropolitan Government of Nashville and Davidson County, and Emmitt Turner, Chief of Police of the Metro Police Department, in his official capacity, seeking a preliminary injunction, permanent injunction and declaratory judgment determining the constitutionality of Chapter 6.54. *See also*, motion (filed October 17, 1997; Docket Entry No. 2) for issuance of a preliminary injunction. On December 1, 1997, a hearing was held before the Honorable John T. Nixon on the motions (Docket Entry Nos. 2 and 11) for a preliminary injunction. On the basis that the ordinance did not provide the proper procedural requirements for a prior restraint of expression protected by the First Amendment, the Court enjoined the defendants from enforcing the ordinance. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.). After the Metro Council amended the ordinance to correct the defects upon which the preliminary injunction was based, the Court dissolved the injunction. Order (entered December 3, 1998, Docket Entry No. 76) (Nixon, J.).[2]

---

[1] Mr. Jerry C. Pendergrass, The 822 Corporation, and 421 Corporation, subsequently initiated their own action (No. 3-97-1176) also seeking preliminary injunction, and sought to intervene in this action. Motion (filed December 17, 1998; Docket Entry No. 11) to intervene and for preliminary injunction. The Court consolidated the actions, deemed the Pendergrass et al. motion to intervene moot, and treated the plaintiffs' motions (Docket Entry Nos. 2 and 11) jointly. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.).

[2] On December 16, 1998, the plaintiffs filed a motion (Docket Entry No. 77) for a stay pending appeal and on December 31, 1998, filed a notice of appeal (Docket Entry No. 94). Judge Nixon recused himself and the case was reassigned to The Honorable Aleta Trauger. *See* order (Docket Entry No. 97) (Nixon, J.). A hearing on the motions for stay

(Continued on following page)

The plaintiffs' second motion (filed December 17, 1998; Docket Entry No. 83) for preliminary injunction, which is now before the Court,[3,4] is based on claims previously reserved by the plaintiffs. *See* plaintiffs' motion (Docket Entry No. 2) for preliminary injunction.[5] In their second

---

pending appeal and for preliminary injunction was held on January 13, 1999, and the motion for stay was denied. Order (entered January 26, 1999; Docket Entry No. 114) (Trauger, J.).The motions (Docket Entry Nos. 81 and 83) for preliminary injunction were set for further hearing on January 27, 1999. Order (entered January 26, 1999; Docket Entry No. 115) (Trauger, J.). By order (Docket Entry No. 109) entered January 20, 1999, the Pendergrass et al. motion (filed December 16, 1998; Docket Entry No. 80) to file an amended complaint was granted, and the amended complaint (Docket Entry No. 121) was filed January 20, 1999.

[3] By order (Docket Entry No. 122) entered February 3, 1999, Judge Trauger recused herself and the case was reassigned to Judge Nixon. By order (Docket Entry No. 124) entered February 18, 1999, Judge Nixon returned the case to the clerk for reassignment. The case was assigned to this Court.

[4] Also before the Court is the plaintiffs' memorandum (filed December 17, 1998; Docket Entry No. 84) in support; the motion (filed December 17, 1998; Docket Entry No. 81) of Jerry Pendergrass and The 822 Corporation for preliminary injunction and their memorandum (Docket Entry No. 82) in support; the plaintiffs' supplemental brief (filed December 31, 1998; Docket Entry No. 96) in support of their second motion for preliminary injunction; the defendants' memorandum (filed January 8, 1999; Docket Entry No. 104) in opposition; the plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111); the defendants' response (filed January 22, 1999; Docket Entry No. 112); and the response (filed January 22, 1999; Docket Entry No. 113) of Jerry C. Pendergrass, The 822 Corporation and 421 Corporation.

[5] Also before the Court is the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) with attached letters dated May 26, 1999, from the Sexually Oriented Business Licensing Board, informing Metro News c/o Jerry Pendergrass; Madam X c/o C.L. Steele; Purple Onion II c/o C.L. Steele; Purple Onion I c/o C.L. Steele; Ken's Gold Club c/o Ken Meroney; and Mr. Mike Rucker c/o Deja Vu; that their applications for sexually oriented business licenses have been approved; the plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike

(Continued on following page)

mction, the plaintiffs contend that, both facially and as applied, Chapter 6.54 violates the First and Fourteenth Amendments to United States Constitution. The plaintiffs also assert that the defendants are collaterally estopped from relitigating the constitutionality of some provisions of the ordinance which were present in a predecessor ordinance to Chapter 6.54, and which the Court found unconstitutional in *Ellwest Stereo Theater v. Boner*, 718 F. Supp. 1553 (M.D. Tenn. 1989) (Higgins, J.). In their motion (Docket Entry No. 81) Mr. Pendergrass and The 822 Corporation reassert their earlier claim that the civil disabilities provision of the ordinance are unconstitutional. *See* motion (Docket Entry No. 81) for preliminary injunction and memorandum (Docket Entry No. 82) in support. Accordingly, the plaintiffs seek declaratory relief in the form of a preliminary injunction under Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202.

The Court has jurisdiction over this matter under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1334(3) and §§ 2201 and 2202. The motions were heard on oral testimony from April 13 to April 16, 1999. For the reasons set forth below, the plaintiffs' motions for preliminary injunction shall be granted.

## I.

The Court must consider the following four factors in determining whether or not to grant a preliminary Injunction:

---

defendants' notice of filing; their brief (Docket Entry No. 166) in support; and the defendants' response (filed June 28, 1999; Docket Entry No. 174).

> (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

*Connection Distrib. Co. v Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Golden v Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996), *cert. denied*, 519 U.S. 807, 117 S.Ct. 49, 136 L.Ed.2d 12 (1996)). The general rule with respect to these factors is that courts are not to give greater weight to any one factor is particular, but are to balance them. *Id.*

When a preliminary injunction is sought because rights guaranteed by the First Amendment are potentially at stake, the first factor, likelihood of success on the merits, will be determinative. *Id.* The Supreme Court of the United States has stated that "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2573, 2690, 49 L.Ed.2d 547, 565 (1976) (plurality) and *citing Newsom v Norris*, 888 F.2d 371, 378 (6th Cir. 1989) for the proposition that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). Therefore, "to the extent that [a party] can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights." *Id.* (citation omitted). Additionally, because "'it is always in the public interest to prevent the violation of a party's constitutional rights,'" harm to the public interest is also established by showing a substantial likelihood of success on the merits. *Id.* (quoting, *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

## II.

Sexually explicit, non-obscene performances and materials are expressions protected by the First Amendment to the United States Constitution. *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310, 326 (1976). However, society is considered to have less interest in protecting this kind of expression than in protecting other kinds of speech. *Id.* Consequently, sexually explicit expression falls within the "outer perimeters of the First Amendment." *Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504, 511 (1991); *see also, Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 438 (6th Cir. 1998). Accordingly, the type of expression which Chapter 6.54 of the Metropolitan Code seeks to regulate is on the "outer perimeters" of expression protected by the First Amendment. *Id.*

Under the due process requirement of the Fourteenth Amendment to the United States Constitution, laws must clearly define the conduct they proscribe. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227 (1972). The vagueness of laws that attempt to regulate speech raises "special concerns under the Federal Constitution's First Amendment because of the obvious chilling effect of such regulations on free speech." *Reno v. ACLU*, 521 U.S. 844, 845, 117 S.Ct. 2329, 2332, 138 L.Ed. 874, 876 (1997). Such laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108, 92 S.Ct. at 2298, 33 L.Ed.2d at 227. This requirement was explained as follows:

> [v]ague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

*Id.* (footnotes omitted).

In determining whether an ordinance is impermissibly vague, the Court " 'must extrapolate its allowable meaning' " while keeping in mind the prohibition on federal courts from construing state statutes. *Id.*, 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228 (quoting *Garner v. Louisiana*, 368 U.S. 157, 174, 82 S.Ct. 248, 257, 7 L.Ed.2d 219 (1961)). In doing so, the Court is " 'relegated . . . to the words of the ordinance itself,' to the interpretations [other courts] have given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." *Id.*

(quoting *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.E.2d 214, 217 (1971)).

A law will be considered impermissibly vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322, 328 (1926). However, if the meaning of the law is commonly understood, it will not be considered vague. *See United States v. J. T. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). Additionally, the prohibited conduct need not be defined with mathematical precision. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. 1995). Nor is a law vague because it "'requires a person to conform his conduct to an imprecise but comprehensible normative standard.'" *Id.* (quoting *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, 498 U.S. 845, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990)).

In addition, laws which are overbroad, threatening the exercise of First Amendment rights, are unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Recognizing that the application of the overbreath doctrine is "'strong medicine,'" the Supreme Court has "employed it with hesitation and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769, 192 S.Ct. 3348, 3361, 73 L.Ed.2d 1113, 1130 (1982) (quoting *Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916, 37 L.Ed.2d at 840).

Moreover, the overbreath must be substantial when the protected expression involves conduct and not speech only. *Id.*, 458 U.S. at 770, 102 S.Ct. at 3361, 73 L.Ed.2d at 1131 (citing *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918, 37 L.Ed.2d at 842). Accordingly, a regulation should not be invalidated for overbreath if it marginally infringes on First Amendment freedoms. *Id.*, 458 U.S. at 770 n.25, 192 S.Ct. at 3362 n.25, 73 L.Ed.2d at 1131 n.25. A law is substantially overbroad if it "reaches a substantial number of impermissible applications," *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132, "judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918, 37 L.Ed.2d at 842. Additionally, laws are unconstitutional if they impose restrictions so broad they cause concern over violating the law thereby, creating a "chilling effect" that curtails the availability of non-obscene expression. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *see also, Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1962).

A facial challenge can be raised on behalf of others under an exception to the ordinary standing requirements on the basis that a law is substantially overbroad. *Regan v. Time*, 468 U.S. 641, 650, 104 S.Ct. 3262, 3268, 82 L.Ed.2d 487, 496 (1984). To prevail on such an attack, the plaintiff must establish that there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *New York State Club Assn. v. New York City*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1, 15 (1988) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 784 (1984)).

Due to concerns of federalism that arise when a federal court reviews the constitutionality of a state regulation that is challenged as unconstitutionally vague or overbroad, the reviewing court may not supply a limiting construction in order to save the regulation from being unconstitutional. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (citing *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991) for the proposition that "federal 'courts do not rewrite statutes to create constitutionality.' ").

Under our First Amendment jurisprudence, protected expressions may be subject to "reasonable time, place or manner" restrictions. *Barnes*, 501 U.S. at 566, 111 S.Ct. at 2461, 115 L.Ed.2d at 511 (1991) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984)). Such a regulation is valid if:

1. If it is within the constitutional power of the government;
2. If it furthers an important or substantial governmental interest;
3. If the government interest is unrelated to the suppression of free expression; and
4. If the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[6]

*Id.*, 501 U.S. at 567, 111 S.Ct. at 2461, 115 L.Ed.2d at 512 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88

---

[6] In *Clark*, the Supreme Court noted that the four part *O'Brien* test for reviewing the constitutionality of regulations of expressive conduct is really the same test as that for time, place, or manner regulations. *Clark*, 468 U.S. at 298, 104 S.Ct. at 3070, 82 L.Ed.2d at 230. This test asks whether the law is content neutral, is "designed to serve a substantial government interest, and allows alternative avenues of communication." *Richland Bookmart*, 137 F.3d at 440.

S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968)). The United States Court of Appeals for the Sixth Circuit and other courts have applied this test when reviewing the constitutionality of laws regulating sexually oriented businesses. *See DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 410 (6th Cir. 1997); *Ellwest*, 718 F. Supp. at 1562; *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

## III.

The plaintiffs do not contest that The Metro government has the constitutional power to enact Chapter 6.54. The plaintiffs contend that Chapter 6.54 is invalid under the second element of the *O'Brien* test because it does not further an important or substantial governmental interest.

The preamble to Chapter 6.54 states that the purpose of the ordinance is "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County." Plaintiffs' exhibit 6. In *Barnes,* the United States Supreme Court upheld Indiana's public indecency statute which was "designed to protect morals and public order," stating that "[t]he traditional police powers of the States is defined as the authority to provide for the public health, safety, and morals and we have upheld such as a basis for legislation." *Barnes,* 501 U.S. at 569, 111 S.Ct. at 2462, 115 L.Ed.2d at 513. Moreover, a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. at 2452, 49 L.Ed.2d at 327.

The evidence reflects that when considering Chapter 6.54, the Metro Council reviewed relevant information and studies from other cities and states evaluating the problems caused by the presence of adult entertainment establishments. *See* notice (filed April 12, 1999; Docket Entry No. 147).[7] Specifically, the Metro Council relied on studies from Minnesota, Phoenix, Tucson, Arizona, and Austin, Texas. These studies indicated that the secondary effects of adult entertainment establishments threaten the health, safety, and welfare of the citizens where they are located. *Id.*

The Metro Council also relied on information collected in Nashville, including: (1) a report from the Metro Police Department stating that undercover officers observed substantial physical contact between dancers in adult entertainment establishments and the patrons of these establishments and that the undercover officers were successful in soliciting prostitution from several women at various establishments; (2) a report from the Metropolitan Health Department of Nashville and Davidson County of an inspection of ten adult entertainment establishments on April 16 and 17, 1997, which stated that "the presence of fresh suspected body fluid was evident in six of the ten establishments inspected;" and (3) a Metropolitan Police Department Intelligence Division Report showing that between January 1, 1996, and January 31, 1997, there were 924 dispatched calls[8] to 36 adult entertainment establishments, of which, 682 required police assistance and involved possible violations of laws or ordinances. *Id.* at tab 3.

---

[7] A city may rely on studies and experiences of other cities in determining whether a regulation furthers a substantial governmental interest. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51, 106 S.Ct. 925, 931, 89 L.Ed.2d 29, 40 (1986).

[8] These calls included: 30 drunk calls, 189 police assistance calls, 143 disorderly calls, 27 vehicle accident calls, 95 theft calls, 45 robbery calls, 24 weapons calls, 32 fighting calls, 64 burglary alarm calls, and 33 tavern check calls. Notice (Docket Entry No. 147) at tab 3.

In light of these studies and reports, the Metro Council set forth in the preamble to Chapter 6.54 the findings that: (1) sex acts are a regular occurrence at adult entertainment establishments in Davidson County, especially were there are private or semi-private booths for viewing films or live sex shows; (2) that certain employees of adult entertainment establishments engage in higher incidents of unlawful activities than others; (3) that the sex acts and resulting unsanitary conditions occurring at some adult entertainment establishments are the result of the failure of the management of those establishments to regulate activities within those establishments; and (4) that other illegal or unhealthy activities occur as a consequence of these conditions. *See,* plaintiffs' exhibit 6. The findings also include the statistics on the number of cases of sexually transmitted diseases, including acquired immunodeficiency syndrome (AIDS), gonorrhea, and syphilis in Tennessee and Davidson County. *Id.*

Based on the information relied upon by the Metro Council in promulgating Chapter 6.54, and its resulting findings as stated in the preamble, the Court finds that the Metro Council's purpose in enacting Chapter 6.54 was "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County" by reducing the spread of diseases which thrive in the conditions created by unregulated adult entertainment establishments and to combat the illegal activity that occurs within and around such establishments. Plaintiffs exhibit 6. Accordingly, the Court finds that the ordinance was promulgated to further an important and substantial governmental interest.

The plaintiffs further contend that Chapter 6.54 is invalid under the third element of the *O'Brien* test because it is a content-specific regulation, aimed at suppressing free expression.

The Court agrees that the regulation pertains exclusively to sexually explicit expression. However, because Chapter 6.54 is focused on the secondary effects of the expression, it will be treated as a content-neutral time, place, or manner regulation.[9] *Richland Bookmart,* 137 F.3d at 439-40. Therefore, the third element of the *O'Brien* test has been met.

The plaintiffs also contend that various portions of the ordinance do not satisfy the fourth element of the *O'Brien* test. The requirement that a regulation must be narrowly tailored to serve the government's interest does not require that the regulation be the "least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism,* 491 U.S. 781, 798, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661, 679 (1989). Instead, a time, place, or manner regulation is narrowly tailored "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Id.*, 491 U.S. at 800, 109 S.Ct. 2758, 105 L.Ed.2d at 679.

---

[9] In *Richland Bookmart*, 137 F.3d at 439-40, the Sixth Circuit found that a regulation which focused exclusively on sexually explicit speech was content-specific on its face. However, the Court explained that although content-specific regulations are generally presumed to be unconstitutional and are subject to strict scrutiny, the Supreme Court has created a legal fiction under which regulations of erotic or sexually explicit expression are treated as if they are content-neutral providing that the regulation is really aimed at the secondary effects of the speech, rather than at the speech itself. *Id.* at 440 (*citing City of Renton*, 475 U.S. at 49, 106 S.Ct. at 929-30, 89 L.Ed.2d at 38-40 and *American Mini Theatres*, 427 U.S. at 70, 96 S.Ct. at 2452, 49 L.Ed.2d at 340). The Supreme Court explained that regulations focusing on sexually explicit expression may be treated differently than regulations of other expression because the interest in protecting sexually explicit speech is marginal. *American Mini Theatres*, 427 U.S. at 72, 96 S.Ct. at 2452, 49 L.Ed.2d at 340.

### A. Civil Disabilities Provision[10]

The plaintiffs contend that the civil disabilities provision of Chapter 6.54 is not narrowly tailored to serve the government's interest. They also contend that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision based on the Court's decision in *Ellwest,* 418 F. Supp. at 1568, that the civil disabilities provision in the predecessor ordinance was not narrowly tailored to serve the government's interest. The plaintiffs also challenge the civil disabilities provision as an impermissible prior restraint on their First Amendment rights.

The ordinance requires that sexually oriented corporations, corporate stockholders holding a majority share of stock who will be involved in the day to day operation of the business, officers, and directors be licensed. Plaintiffs' exhibit 5 at §§ 6.54.040(A)(1)&(4). Individual entertainers must also obtain a permit. Chapter 6.54.060(A).

---

[10] The parties refer to these provisions as the criminal disabilities provisions but in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607, 107 L.Ed.2d 603, 621 (1990), the Supreme Court refers to a similar provision as the civil disabilities provision. The Supreme Court did not reach the merits of the plaintiff's challenge to the civil disabilities provision in *FW/PBS* because the Court found that the plaintiffs did not have standing to challenge the provision. *Id.*, 493 U.S. at 233, 110 S.Ct. at 608, 107 L.Ed. 2d at 623.

Under the civil disabilities provision of the ordinance, no individual applicant for a license or permit who has had a misdemeanor conviction for a crime of a sexual nature[11] may receive a license or permit for two years following the date of the conviction and no applicant who has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *Id.* at §§ 6.54.050(B)(2) and 6.54.080(A)(2).

### 1. *standing*

That "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS,* 493 U.S. at 231, 110 S.Ct. at 607, 107 L.Ed.2d at 621 (quoting *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 569 (1984)). The party seeking to exercise jurisdiction must "'clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Id.*, 493 U.S. at 231, 110 S.Ct. at 608, 107 L.Ed.2d at 622 (quoting *Warth v.*

---

[11] Chapter 6.54.010(C) defines "crimes of a sexual nature" as:

> the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

Plaintiffs' exhibit 5.

*Seldin,* 422 U.S. 490, 518, 95 S.Ct. 2197, 2215, 45 L.Ed.2d 343, 366 (1975)). A party asserting standing must prove:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

*DLS,* 107 F.3d at 414 (citing *G & V Lounge,* 23 F.3d at 107).

Accordingly, to establish standing to challenge the civil disabilities provision of the ordinance, individual plaintiffs must show that they are required to obtain a permit or license under the ordinance and that they will be unable to do so because they were convicted of a misdemeanor of a sexual nature within two years of their application, or that they were convicted of a felony of a sexual nature within five years of their application. *See, FW/PBS,* 493 U.S. at 234, 110 S.Ct. at 609, 107 L.Ed.2d at 624. In order for a sexually oriented business to have standing, it must show that it will be unable to obtain a license because an individual applicant, such as a corporate director or officer who is required to be licensed in order for the business to be licensed, will be ineligible to obtain a license due to the civil disabilities provision.

Deja Vu and Mr. Michael Butler assert that they have standing to challenge the civil disabilities provision of the ordinance. As a sexually oriented business, Deja Vu is required to be licensed under Chapter 6.54. Michael Butler and Deja Vu contend that Mr. Butler is a former vice-president of Deja Vu and that if he were still a vice-president he would also be required to obtain a license.[12] The plaintiffs presented evidence that in November of 1994, Mr. Butler was convicted under the Uniform Code of Military Justice with felony statutory rape.[13] Mr. Butler's conviction was for a felony of a sexual nature and was within five years of March 15, 1999, when Chapter 6.54.030(F) would have required him to apply for a license. Accordingly, Mr. Butler would be prohibited from obtaining a license under the civil disabilities provision of Chapter 6.54. Deja Vu argues that it also has standing because if Mr. Butler had remained a vice-president, it would have been unable to obtain a license to operate under the civil disabilities provision of the ordinance because, in order to do so, Mr. Butler would have had to be licensed.

The Court finds that because Mr. Butler is no longer employed by Deja Vu as a vice-president, he is no longer required to obtain a license as a corporate officer of Deja Vu. Additionally, Deja Vu would not be prohibited from receiving a license based on Mr. Butler's conviction. Accordingly, neither Mr. Butler nor Deja Vu have standing to challenge the constitutionality of the civil disabilities provision of the ordinance.

---

[12] Mr. Butler testified that he resigned from his position at Deja V in November of 1998, only because of the licensing requirement.

[13] Mr. Bulter testified to this fact and also submitted an affidavit affirming it. Affidavit (filed December 17, 1998; Docket Entry No. 86) of Michael Butler.

Mr. Pendergrass and The 822 Corporation also challenge the civil disabilities provisions of the ordinance. The plaintiffs aver that Metro News, which is owned by The 822 Corporation, is a theater and retail bookstore dealing in the display and retail sale and rental of printed and pictorial materials of an erotic and sexual nature and is, therefore, a sexually oriented bookstore required to be licensed under Chapter 6.54. Mr. Pendergrass is the sole shareholder, an officer, and a director of The 822 Corporation. Therefore, in order for The 822 Corporation to be licensed under the ordinance, Mr. Pendergrass must also be licensed. At the hearing, Mr. Pendergrass testified that he was convicted on May 22, 1997, of a misdemeanor obscenity offense in Hamilton County, Tennessee. He was required to apply for a license in Nashville by March 15, 1999, within two years of the date of that conviction. Therefore, pursuant to the civil disabilities provision of the ordinance, Mr. Pendergrass, and consequently The 822 Corporation, would be ineligible for a license. Accordingly, the Court finds that Mr. Pendergrass and The 822 Corporation have standing to challenge the civil disabilities provision of the ordinance.[14]

---

[14] In their motion (Docket Entry No. 165) to strike the defendants' notice (Docket Entry No. 157), the plaintiffs' contend that the notice goes to the issue of whether the plaintiffs have standing to challenge certain aspects of the licensing provisions in Chapter 6.54 in their second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. They argue that their motion to strike should be granted because at the end of the hearing on the plaintiffs' motions, the Court stated:

### 2. *collateral estoppel*

The plaintiffs claim that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision of the ordinance based on the Court's holding in *Ellwest* that the civil disabilities provision of the predecessor ordinance was unconstitutional because it was not narrowly tailored to serve the government's interest.

The defendants assert that collateral estoppel does not apply to bar relitigation of any provisions in Chapter 6.54 because "[t]he law regulating sexually explicit expression has changed over the past ten years such that regulations that may have been unconstitutional in 1989 may be constitutional now." Defendants' memorandum (Docket Entry No. 104) at 15.

Collateral estoppel does not apply when there has been a significant change in the applicable law. *Disabled Am. Veterans v. Commissioner of Internal Revenue*, 942 F.2d 309, 313 (6th Cir. 1991); *see also, Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 913 (9th Cir.

---

> this is the evidentiary record on the application for preliminary injunction and when we close here today this is going to constitute the record.

Plaintiff's brief (Docket Entry No. 166) in support at 2.

Accordingly, the Court finds that the record for the motions (Docket Entry Nos. 81 and 83) for second preliminary injunction was closed at the end of the evidentiary hearing on April 15, 1999. As the defendants have not been granted leave to file additional materials, the Court shall grant the plaintiffs' motion (Docket Entry No. 165) to strike insofar as the notice relates to the plaintiffs' motions (Docket Entry Nos. 81 and 83). Accordingly, the defendants' notice will not be considered evidence in support of, or in opposition to, the plaintiffs' second motions for preliminary injunction. However, the plaintiffs' motion (Docket Entry No. 165) to strike shall be denied in all other respects.

1997). The Supreme Court has found that such a change may occur when there is a "'judicial declaration intervening between the two proceedings ... a modification or growth in legal principles as enunciated in intervening decisions of this Court . . . [or] an interposed alteration in the pertinent statutory provisions.'" *Disabled Am. Veterans*, 942 F.2d at 313 (quoting *Sunnen v. Commissioner of Internal Revenue*, 333 U.S. 591, 600, 68 S.Ct. 715, 720, 92 L.Ed. 898, 907 (1948)).

The defendants have not established that there has been a sufficient change in the case law between the time the Court rendered its decision in *Ellwest* and now regarding the provisions of the ordinance that the plaintiffs contend the defendants cannot relitigate.

The defendants also argue that collateral estoppel does not apply because the precise issues raised in this case are different from those litigated in *Ellwest.* In order for litigation of an issue to be barred based on collateral estoppel, "the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding." *N.A.A.C.P., Detroit Branch v. Detroit Police Officer's Assoc.*, 821 F.2d 329, 330 (6th Cir. 1987) (footnote omitted).[15] The defendants contend that the issues in this case are different than the issues in *Ellwest* because the purpose of the ordinance in *Ellwest* was only to protect the health of the citizens of Nashville and Davidson County, whereas the purpose of Chapter 6.54, presently before the Court, is the broader purpose of promoting "the health, safety, morals, and general welfare of the citizens of Metropolitan Nashville Davidson County." Defendants' memorandum (Docket Entry No. 104) at 17.

---

[15] Collateral estoppel also requires that a "determination of the issue must have been necessary to the outcome of the prior proceeding; that the prior proceeding must have resulted in a final judgment on the merits; and that the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issues in the prior proceeding." *N.A.A.C.P. Detroit Branch,* 821 F.2d at 330.

The record reflects that the first paragraph of the ordinance under consideration in *Ellwest* states that the purpose of the ordinance is to protect and promote the "general welfare, health, and safety" of Nashville's citizens. Plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111) to defendants' memorandum of law in opposition. Accordingly, the purpose of Chapter 6.54 is broader only insofar as it also states that its purpose is to protect the morals of the citizens of Nashville.

The Court finds that the fact that the government added that the purpose of the ordinance is to protect the morals of the citizens is not sufficient to change the issue of the constitutionality of the ordinance. Accordingly, collateral estoppel is not inapplicable based on the allegedly broader purpose of Chapter 6.54.

With respect to the civil disabilities provision in particular, the defendants assert that collateral estoppel does not apply because the issue with respect to the constitutionality of the civil disabilities provision in this case is different from that in *Ellwest*. In *Ellwest,* the ordinance provided that applications for permits and licenses were to be denied if the applicant had been convicted or pleaded *nolo contendre* "to a felony or any crime involving moral turpitude, prostitution, obscenity or any crime of a sexual nature in any jurisdiction within the five (5) years immediately preceding the date of the application." *Ellwest,* 718 F. Supp. at 1568 (quoting

Section 5(a)(1)(ii) of Metropolitan ordinance (Bill No. 086-1549)).[16] In contrast, Chapters 6.54.050(B)(2) and 6.54.080(A)(2) limit the crimes for which an application may be denied to convictions of felonies or misdemeanors for crimes of a sexual nature. Plaintiffs' exhibit 5. Accordingly, the Court finds that the precise issue in this case was not litigated in *Ellwest* and that the defendants are not collaterally estopped from litigating the constitutionality of the civil disabilities provision in Chapter 6.54. *N.A.A.C.P., Detroit Branch,* 821 F.2d at 330.

### 3. *prior restraint*

The plaintiffs challenge the civil disabilities provision of Chapter 6.54 as an impermissible prior restraint on protected expression. They argue that the government cannot preclude a person or his employer from obtaining a license or permit to engage in constitutionally protected expression based on the fact that the person was previously convicted of obscenity.

Although laws may validly prohibit certain types of expression not protected by the First Amendment, a prior restraint on the exercise of First Amendment rights is "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stewart*, 427

---

[16] This provision was found to be unconstitutional because it was not narrowly tailored to serve the government's interest in denying applications to those who were likely to operate their business in contravention of the ordinance. *Ellwest*, 718 F. Supp. at 1568. The Court reasoned that if the disclosure requirement had been limited to "such crimes as prostitution," rather than to any felony, there may have been a "reasonable inference that the applicant would be more likely to operate an adult-oriented establishment in contravention of the ordinance." *Id.*

U.S. 539, 559, 96 S.Ct. 2781, 2803, 49 L.Ed.2d 683, 697 (1975). Accordingly, "'[*any* system of prior restraints of expression [bears] a heavy presumption against its constitutional validity.'" *Vance v. Universal Amusement Co. Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2d 413, 421 (1980) (quoting *Bantam Books,* 372 U.S. at 70, 83 S.Ct. at 639, 9 L.Ed.2d. at 593 (emphasis in original) (citations omitted)). Prior restraints against expression protected by the First Amendment are disfavored because "[i]t is difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable," *Vance*, 445 U.S. at 315 n.13, 100 S.Ct. at 1161 n.13, 63 L.Ed.2d at 420 n.13 (citations omitted).

In *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986), *cert. denied,* 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986), the Sixth Circuit considered the constitutionality of a nuisance abatement law which required the business license of distributors and exhibitors of adult oriented materials to be revoked if it was judicially determined that they had distributed obscene materials. The Court found that if:

> the abatement procedure focuses on regulating the future speech of a defendant who has been adjudged "guilty" of distributing obscene material, the law is tantamount to a licensing statute establishing a prior restraint of the defendant's first amendment right to engage in nonobscene expression. To use the language of *Near v. Minnesota,* a nuisance abatement procedure applied to obscenity should be upheld if "[t]he object of the [procedure] is punishment, in the ordinary sense, [rather than] suppression of the offending

> [business]" and if the procedure does not "operat[e] to . . . put the publisher under an effective censorship." 283 U.S. at 709-12, 51 S.Ct. at 628-30.

*City of Paducah*, 791 F.2d at 469. The Court went on to find that the ordinance was an impermissible prior restraint because it went "beyond merely deterring or punishing individuals who deal in obscene materials . . . to control [their] future expression." *Id.* at 470.

The Sixth Circuit further noted that the Supreme Court has permitted prior restraints provided that the following procedural safeguards are in place to prevent the prior restraints from causing censorship:

> the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period of time and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

*Id.* (quoting *Southeastern Promotions, Ltd. v. Conrad*, 402 U.S. 546, 560, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448, 460 (1975)).

In *City of Paducah*, the Sixth Circuit found that there were adequate safeguards within Paducah's nuisance abatement ordinance. *Id.* Nevertheless, the Court found that the ordinance was unconstitutional because it "would still operate as a prior restraint on plaintiff's future distribution of non-obscene materials." *Id.*

Based on the Sixth Circuit's conclusion in *City of Paducah*, the Court finds that, because Chapter 6.54

requires the sexually oriented licensing board to deny applicants a license or permit based on a prior conviction of obscenity, the civil disabilities provision of the ordinance is an unconstitutional prior restraint. Accordingly, the Court finds that there is a substantial likelihood that the plaintiffs will succeed on the merits of their challenge to the civil disabilities provision of the ordinance.[17]

The defendants cite *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154 (Wash. 1997), and *DLS*, 1107 F.3d 403 (6th Cir. 1997), in support of the constitutionality of the civil disabilities provision. However, the Court finds that these cases do not support the constitutionality of the civil disabilities provision in Chapter 6.54.

In *Ino Ino*, the plaintiffs challenged a similar civil disabilities provision only as a violation of the applicant's right to privacy. *Ino Ino*, 937 P.2d at 167-68. Accordingly, the Court does not find the decision in *Ino Ino* to uphold the civil disabilities provision in that case to be instructive. In *DLS,* the Sixth Circuit upheld a similar civil disabilities provision in a Chattanooga ordinance regulating sexually oriented businesses. The civil disabilities provision in that case prohibited an applicant from receiving a license or permit if the applicant had been convicted of or pleaded *nolo contendre* to "a felony or any crime involving moral turpitude, prostitution, obscenity, or other crime of a sexual nature." *DLS,* 107 F.3d at 414. The plaintiffs "only argument" against the civil disabilities provision of the Chattanooga ordinance was "the fact that they were not enforced against the productions of *Hair* or *Oh! Calcutta!* demonstrates that they vest the City with unbridled discretion to award or deny licenses or permits." *Id.* Accordingly, the Sixth Circuit did not address whether it was permissible to deny a person a license to engage in expression protected by the First Amendment because they had a previous conviction for obscenity. Therefore, the Court does not find the Sixth Circuit's decision to uphold the civil disabilities provision in that case to be determinative on the facts in this litigation.

---

[17] In *Ellwest,* this Court noted that "the practice of denying a person a license to engage in activities protected by the First Amendment based on prior convictions is constitutionally suspect. In particular, the courts have consistently struck down ordinances which permit or require the denial or revocation of a license to show adult-oriented motion pictures on the basis that an applicant or an employee of an applicant has been convicted of obscenity." *Ellwest*, 718 F. Supp. at 1572 n.5 (citations omitted).

### B. Disclosure of Personal Information

The plaintiffs next challenge the provisions of Chapter 6.54 requiring that applicants disclose certain personal information. The plaintiffs challenge the requirement in Chapter 6.54.040(A)(5)(c) and 6.54.070(A)(4)(c) that applicants disclose their residential addresses for the past three years, the requirements in Chapter 6.54.040(A)(5)(g) and 6.54.070(A)(4)(g) that applicants submit their fingerprints and two portrait photographs, and the requirement in Chapter 6.54.070(A)(4)(d) that applicants disclose their "height, weight, color of eyes, and hair." Plaintiffs' exhibit 5.

The government contends, and the ordinance states, that applicants are required to comply with these provisions "for the purpose of facilitating the police investigation into the applicant's criminal background." Plaintiffs' exhibit 5, Chapter 6.54.040(A)(5)(c) & (g), 6.54.070(A)(4)(c), (g) & (d).

In light of the fact that the Court has found the plaintiffs are likely be successful on their challenge to the civil disabilities provision of the ordinance, the Court further finds that it is also likely that the plaintiffs will be successful on their challenge to the disclosure requirements, as the only purpose for their inclusion in the ordinance is to facilitate the civil disabilities provision.[18]

### C. Fee Requirements

Chapter 6.54.090 imposes a $500 fee on applications for a license and a $100 fee for applications for a permit. The plaintiffs challenge the constitutionality of these fees by asserting that they are excessive and are unconstitutional insofar as they are imposed to facilitate portions of the application process the Court has concluded will likely be found unconstitutional. The defendants contend that the fees are narrowly tailored to facilitate the administration of the ordinance and are, therefore, not excessive.

It is well established that the government may not tax the exercise of a constitutionally protected right. *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir. 1997). However, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest." *Id.* at 1109-1110. Such a fee is not excessive, even if it is more than nominal, so long as it is "'reasonably related to the expenses incident to the administration of the ordinance.'" *Id.* at 1110 (quoting *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136 (6th Cir. 1991)).

---

[18] Moreover, at the hearing on the plaintiffs' motions, Captain Judith D. Bawcum, an officer with the Metropolitan Police Department, testified that in order to run a criminal background check, the police use the person's name and date of birth, and that they sometimes also use a fingerprint if the person goes to the police station.

The deposition testimony of Mr. Terry Cobb, Director of the Codes Department of Metropolitan Nashville Davidson County, established that the direct costs of processing permits for entertainers is $43, which includes: (1) $24 for the criminal background check; (2) $9 for fingerprinting; and (3) $10 for a photo identification. Brief (Docket Entry No. 84) in support of plaintiffs' second motion for preliminary injunction, attachment, exhibit W at 24-25. The direct costs of processing individual license applications is $33, which includes: (1) $24 for the criminal background check; and (2) $9 for fingerprinting. *Id.*

In light of the fact that the Court has found that the civil disabilities provision of Chapter 6.54 is likely to be found unconstitutional, the Court further finds that, insofar as the fees charged under Chapter 6.54.090 are for the administration of the civil disabilities provision, there is a substantial likelihood that the plaintiffs will also succeed on their challenge of the fee provision.

### D. Three-Foot Buffer Zone

Chapter 6.54.140(C) also provides that "[a]ll performances . . . shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer." Plaintiffs' exhibit 5. The plaintiffs contend that this provision violates the *O'Brien* test because it is content-specific and not narrowly tailored to serve the government's interest. The plaintiffs also contend that the buffer zone is vague because it does not indicate how three feet is to be measured. Finally, the plaintiffs contend that the buffer zone violates the First Amendment rights of customers and entertainers to freedom of association.

### 1. *content-neutral*

In the plaintiffs' view, the distance requirement is an attempt to ban dances, such as table or couch dances, that allow entertainers to convey a message of intimacy and eroticism through their proximity to the customer. Therefore, the plaintiffs contend that the buffer zone is a content-specific regulation and should be reviewed under strict scrutiny.[19]

The Court has found that the ordinance, including the buffer zone provision, was written primarily to combat the secondary effects of adult entertainment and is not subject to strict scrutiny. *Richland Bookmart*, 137 F.3d at 439.

---

[19] In support of their contention that distance is a central part of the expressive content of erotic dances, the plaintiffs presented the expert testimony of Dr. Judith Lynne Hanna, a cultural anthropologist who studies messages conveyed by dance. Dr. Hanna testified that proximity is an integral component of erotic dance performances and conveys a message of intimacy. In addition, dancers testified at the hearing that in order to convey the message they intend with their performances, it is often important that they be able to whisper to the customer for whom they are performing. Dancers testified that if they are required to remain three feet from a customer, their ability to convey messages through such oral communication would be impossible because the loud music in the entertainment establishment would make whispers inaudible.

Accordingly, the Court will treat the buffer zone as a content-neutral time, place or manner regulation.

### 2. *narrowly tailored*

The plaintiffs contend that the buffer zone is not narrowly tailored to serve the government's interest in preventing sexual contact between entertainers and patrons. The plaintiffs rely on *Schenck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed. 1 (1997), in which the Supreme Court held that an injunction prohibiting abortion protesters from coming within 15 feet of people entering and leaving abortion clinics was unconstitutional because it "burdened more speech than necessary to serve the relevant governmental interest." *Id.,* 519 U.S. at 377, 117 S.Ct. at 867, 137 L.Ed.2d at 21. The Court's decision was based on the conclusion that, because the buffer zone floated around the people coming to and from the clinic, it would be difficult for protesters to remain in compliance with it and for courts to enforce it. *Id.*, 519 U.S. at 379, 117 S.Ct. at 867, 137 L.Ed.2d at 21 and n.9. Additionally, the Court was concerned that due to the uncertainties caused by the fact that the zone floated, there was a substantial risk that more speech will be burdened than the injunction prohibits. *Id.*

*Schenck* is distinguishable from this case for several reasons. The buffer zone in this case differs from the one in *Schenck* in that the buffer zone in *Schenck* was truly a floating buffer zone which surrounded the clinic visitors as they came and went from the clinic. Chapter 6.54, however, requires that during their performances, entertainers are to remain on a stage eighteen inches above the ground and three feet from the nearest customer. Consequently, the three-foot buffer zone is fixed by the parameters of the stage, even though it may partially float around performers within those parameters.

The Court's decision in *Schenck* was also based on the conclusion that it prevented protestors from talking to clinic visitors at a normal conversational level. The plaintiffs contend that the three-foot buffer zone in this case suffers from the same problem because performers will not be able to carry on conversations with customers during performances from three feet due to the loud music in the entertainment establishments.

This problem differs from the one in *Schenck* because performers are not prevented from speaking to customers at a normal level entirely because of the three-foot distance requirement. Instead, as the plaintiffs admit, they are hampered due to the volume of the music in the entertainment establishments. The noise level is a factor completely under the control of the entertainment establishments and has no bearing on the constitutionality of the buffer zone.[20]

---

[20] *Schenck* is also distinguishable for other reasons. First, the Supreme Court determined that the "'standard time, place, and manner analysis is not sufficiently rigorous' when it comes to evaluating content neutral injunctions that restrict speech." *Schenck,* 519 U.S. at 385, 117 S.Ct. at 857, 137 L.Ed.2d at 17 (quoting *Madsen v. Women's Health Ctr. Inc.,* 512 U.S. 753, 765, 114 S.Ct. 2516, 2519, 129 L.Ed.2d 593, 593 (1994)). Second, the Court was concerned with political speech that "lie[s] at the heart of the First Amendment." *Schenck,* 519 U.S. at 358, 117 S.Ct. at 858, 137 L.Ed.2d at 21. Erotic expression, on the other hand, falls within the "outer parameters of the First Amendment." *Barnes,* 501 U.S. at 566, 111 S.Ct. at 2460, 115 L.Ed.2d at 511. Finally, the sidewalks in *Schenck* were the "prototypical example of a traditional public forum," and adult entertainment establishments are not.

(Continued on following page)

Accordingly, the Court finds that the Supreme Court's decision in *Schenck* that the buffer zone violated the protestor's free speech rights is not determinative with respect to the constitutionality of the buffer zone in Chapter 6.54.

The plaintiffs also argue that the same interest may be accomplished without the buffer zone through the prohibitions on sexual contact, caressing, fondling, or touching found in Chapter 6.54.140(A) and (B). A content-neutral regulation of expression designed to combat secondary effects such as the buffer zone in this case is not invalid because there is an "imaginable alternative that might be less burdensome on speech." *Ward,* 491 U.S. at 797, 109 S.Ct. at 2757, 105 L.Ed.2d at 679. Instead, if the regulation is not "substantially broader than necessary to achieve the government's interest," it will be upheld. *Id.* at 800, 109 S.Ct. at 2757, 105 L.Ed.2d at 681. In *DLS,* the Sixth Circuit determined that a six-foot buffer zone between patrons and entertainers in adult entertainment establishments was narrowly tailored to serve the city's interest in preventing contact between customers and entertainers, and thereby prevent crime and disease. *DLS,* 107 F.3d at 413. Noting that the buffer zone "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative," such as a no-touch rule, the Sixth Circuit found that the buffer zone was narrowly tailored. *Id.* at 412 (citing *Ward,* 491 U.S. at 800, 109 S.Ct. at 2757-58, 105 L.Ed.2d at 681.).

---

*Schenck,* 519 U.S. at 358, 117 U.S. at 858, 137 L.Ed.2d at 21 (citations omitted).

Likewise, the Court finds that even though Chapter 6.54.140(A) and (B) prohibit sexual contact, caressing, fondling and touching, the three-foot buffer zone is narrowly tailored to serve the government's interest in preventing crime and sexual contact between entertainers and patrons. Accordingly, the Court finds that the plaintiffs are not likely to succeed in their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is not narrowly tailored to serve the government's interest.

### 3. *economic impact*

The plaintiffs next contend that the buffer zone is unconstitutional because of the severity of the economic impact it will have upon adult entertainment establishments. Because of this impact, the plaintiffs contend that the erotic expression is, in effect, being driven from the marketplace of ideas in violation of the First Amendment.

In *DLS*, the Sixth Circuit considered whether the economic impact of ordinances regulating adult entertainment renders such ordinances unconstitutional under the First Amendment. *DLS,* 107 F.3d at 413. The Court found that if an ordinance were to "destroy the market for adult cabarets, it might run afoul of the First Amendment, but not merely if it had adverse effects on the individual theater." *Id.* (citation omitted). Consequently, the economic impact on individual establishments does not raise First Amendment concerns. The appropriate inquiry is whether the economic impact of an ordinance in the aggregate forecloses a "reasonable opportunity" to operate an adult cabaret. *Id.* (citing *Renton,* 475 U.S. at 54, 106 S.Ct. at 932, 819 L.Ed.2d at 42).

Deja Vu presented evidence that, because of the configuration of seats and stages in its Nashville club and Ken's Gold Club, a majority of the floor space in these establishments will not be useable for the seating of customers if the three-foot buffer zone is in effect.

The Court finds that this evidence only establishes that the ordinance will impose a hardship of an undeterminable degree upon an undeterminable number of cabarets. It does not establish that the buffer zone forecloses a reasonable opportunity to open and operate a cabaret in Nashville. The plaintiffs did not present any evidence that the ordinance will destroy the market for adult cabarets. Nor did the plaintiffs present evidence that a three-foot buffer zone had been responsible for the closing of any adult cabaret in other areas.[21]

The plaintiffs have failed to present sufficient evidence to establish that the buffer zone would foreclose reasonable opportunities to open and operate adult cabarets.

---

[21] At the hearing on the plaintiffs' motions (Docket Entry Nos. 81 and 83), the plaintiffs presented the testimony of Mr. Paul Bern in an attempt to establish that the application of a three-foot buffer zone would destroy the economic viability of adult cabarets in Nashville. Mr. Bern testified that the imposition of a four-foot buffer zone in adult cabarets in Washington State caused one profitable cabaret to become unprofitable. The Court finds that this testimony does not establish that Chapter 6.54 will prevent adult cabarets in Nashville from being viable. First, Mr. Bern only testified to the effect of the Washington ordinance on one cabaret. Moreover, Mr. Bern did not testify that any adult cabarets had closed in Washington. Additionally, the Washington ordinance contained other restrictions in addition to the buffer zone, including a lighting requirement, that could have caused the negative impact on the cabaret. *See Ino Ino, Inc. v City of Belleview,* 937 P.2d 154, 171 (Wash. 1997). Accordingly, the Court finds that this evidence does not establish a likelihood of a similar effect due to the three-foot buffer zone in Chapter 6.54.

Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the economic impact of the buffer zone causes it to be unconstitutional.

### 4. *freedom of association*

The plaintiffs contend that when an entertainer performs for a customer, they are engaging in private or intimate association and expressive association protected by the First Amendment which will be hampered by the buffer zone. Accordingly, the plaintiffs contend that the constitutionality of the buffer zone should be reviewed under strict scrutiny.

Our First Amendment jurisprudence has recognized private or intimate association and expressive association:

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.

*Dallas v. Stanglin,* 490 U.S. 19, 24, 109 S.Ct. 1591, 1594, 104 L.Ed.2d 18, 25 (1989) (quoting *Roberts v. United States Jaycees,* 468 U.S. 609, 617-18, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462, 471 (1984)). Those relationships that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life" are protected by the First Amendment as intimate relationships. *Roberts,* 468 U.S. at 619-620, 104 S.Ct. at 3250, 82 L.Ed.2d. at 472. In order to determine whether a relationship may be protected under the First Amendment as intimate association, the Court may look at such factors as the number of people in the relationship, its purpose, policies, selectivity, and congeniality, as well as other relevant characteristics. *Id.*, 468 U.S. at 620, 104 S.Ct. at 3251, 82 L.Ed.2d at 472-73. Expressive association is protected to ensure that individuals who are pursuing the same or similar "political, social, economic, educational, religious, and cultural ends" may associate with each other. *Id.*, 468 U.S. at 622, 104 S.Ct. at 3252, 82 L.Ed.2d. at 472.

With respect to whether the contact between entertainers in adult cabarets and customers rises to the level of intimate association, performers entertain individuals who are willing to pay admission to the cabaret and a tip. Therefore, the association is not selective. Additionally, the customers generally view performances in the presence of all the other customers rather that in secluded areas. Therefore, even though the contact may be sexual in nature, it is not intimate. Accordingly, the Court finds that the association between entertainers and customers does not rise to the level of intimate association protected by the First Amendment.

With respect to whether the entertainment rises to the level of expressive association protected by the First Amendment, the Court finds that the entertainers and customers in adult entertainment establishments do not associate in order to pursue "political, social, economic, educational, religious, and cultural ends." *Roberts,* 468 U.S. at 622, 104 S.Ct. at 3252, 82 L.Ed.2d. at 474. Accordingly, the Court finds that the association between entertainers and customers does not rise to the level of expressive association protected by the First Amendment.

As the Court has determined that customers and entertainers are not engaged in either intimate or expressive association, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone impermissibly interferes with their First Amendment right to freedom of expression.

### 5. *vagueness*

Finally, the plaintiffs contend that the buffer zone is impermissibly vague because it fails to provide any guidance as to how the three-foot distance requirement is to be measured.[22] The defendants contend that there is not a substantial likelihood that the plaintiffs will be successful in their vagueness claim because in *DLS*, 107 F.3d at 411, the Sixth Circuit upheld an ordinance establishing a similar six-foot buffer zone. The defendants further contend that the ordinance is not vague because "three feet" is a common and understandable term.

---

[22] At the hearing on the plaintiffs' motions, the plaintiffs demonstrated that whether the measurement is taken from the place where the nearest customer is standing or from the place where the nearest customer could reach may determine whether the customer will be able to hand the entertainer money while she is on stage performing.

The Court finds that the Sixth Circuit's holding in DLS that a six-foot buffer zone was constitutional is not indicative of the plaintiffs' likelihood of success on the merits as the plaintiffs in *DLS* failed to challenge the buffer zone provision in that case as unconstitutionally vague. Based on the "words of the ordinance itself," the Court agrees that the ordinance does not provide any guidance with respect to how three feet is to be measured. *Grayned,* 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228. As for "the interpretation of the [ordinance] given by those charged with enforcing it," Charles Watkins, the Sexually Oriented Business Inspector, testified during the hearing of the plaintiffs' motions that he was did not know how three feet would be measured. *Id.*

However, in determining whether a law regulating expressive activity is vague, courts do not require "perfect clarity and precise guidance." *Ward,* 491 U.S. at 794, 108 S.Ct. at 2755, 105 L.Ed.2d at 677 (citing *Grayned,* 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228-229 for the proposition that "we can never expect mathematical certainty in our language."). Although the standard for measuring three feet is "undoubtedly flexible, and the officials implementing [it] will exercise considerable discretion," the Court finds that the buffer zone is not unconstitutionally vague. *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is impermissibly vague.

### E. Prohibition Against Physical Contact

Chapter 6.54.140(C) states that "[n]o customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment." Plaintiffs' exhibit 5. The plaintiffs challenge this provision as overbroad because it prohibits incidental, unintentional, benign, or non-sexual contact between customers and entertainers.

In support of this assertion, the plaintiffs cite *Threesome Entertainment v. Strittmather*, 4 F. Supp. 719, 722-23 (N.D. Ohio 1988). In *Strittmather*, a similar no-touch provision was found to be unconstitutional because it lacked a mens rea requirement. However, the prohibition against touching in that case is distinguishable from the no-touch provision in Chapter 6.54 in that it provides criminal penalties.

Moreover, in order to be considered overbroad, a law must substantially threaten the exercise of First Amendment rights. *Ferber*, 458 U.S. at 770, 102 S.Ct. at 3361, 73 L.Ed.2d at 1131. However, even if dancers remain a greater distance from customers while performing than they might if the law prohibited only intentional touching, the increased distance will not substantially threaten the exercise of their First Amendment right by significantly changing the message of their performance. *See KEV, Inc. v. Kitsap County*, 793 F.3d 1053, 1061 (1986). Furthermore, the Court finds that performances are unlikely to be affected by the no-touch provision in light of the fact that the performers are required to remain three feet from the nearest customer while performing under the buffer zone provision in the ordinance. Accordingly, the Court finds that there is not a substantial likelihood that the plaintiffs will he successful on their overbreath challenge of the no-touch provision in Chapter 6.54.140(C).

### F. Hours of Operation

Chapter 6.54.120(A) requires that "[a]ll sexually oriented businesses shall be closed between the hours of three a.m. and eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays." Plaintiffs' exhibit 5. The plaintiffs contend that this provision does not further a substantial government interest, and therefore, fails the second prong of the *O'Brien* test. *Barnes*, 501 U.S. at 567, 111 S.Ct. at 2460, 115 L.Ed. 2d at 512. The plaintiffs further contend that because this restriction only applies to businesses protected by the First Amendment, it violates the Equal Protection Clause of the Fourteenth Amendment. The defendants contend that the Court should deny the plaintiffs' motion with respect to this challenge because the same restriction was upheld by this Court in *Ellwest*, 718 F. Supp. at 1577, and a similar restriction was upheld by the Sixth Circuit in *Richland Bookmart*, 137 F.3d at 43.

The Court has found that reducing crime and the spread of sexually transmitted diseases is an important or substantial government interest. The preamble to Chapter 6.54 does not contain any information distinguishing the early morning hours from other hours with respect to the secondary effects of adult entertainment establishments. However, "[i]t is not unreasonable to believe that such regulation of hours of [adult entertainment establishments] would tend to deter prostitution" and other crimes. *Richland Bookmart*, 137 F.3d at 440-41. Moreover, adult entertainment establishments are only required to close 5 hours a day on weekdays and nine hours on Sunday. This is a minor infringement upon activity protected by the First Amendment. *Ellwest*, 718 F. Supp. at 1577. Accordingly, the Court finds that the hours of operation restriction is a valid time, place, or manner regulation.

In support of the plaintiffs' challenge under the Equal Protection Clause of the Fourteenth Amendment, the plaintiffs contend that patrons of adult entertainment establishments have a fundamental right to visit adult establishments during the hours the ordinance requires those establishments to be closed. Therefore, the plaintiffs argue that the Court should review the constitutionality of the hours of operation provision under strict scrutiny.

Heightened scrutiny is not the appropriate level of scrutiny for regulations challenged as violating the Equal Protection Clause unless a government regulation utilizes "a classification [that] warrants some form of heightened review because it jeopardizes [the] exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1, 12 (1992). If not, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.*

The Court finds that there is no fundamental interest in attending adult entertainment establishments during the hours in which the ordinance requires them to be closed. Nor does the hours of operation provision categorize patrons of adult entertainment establishments or adult entertainments on the basis of an "inherently suspect characteristic." *Id.* Accordingly, review of the hours of operation provision under heightened scrutiny is not appropriate based on the plaintiffs' challenge. The Court has found that the hours of operation provision furthers an important or substantial government interest. Therefore, the hours of operation provision is also rationally related to a legitimate state interest. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their challenges to Chapter 6.54.120(A) as an unconstitutional regulation under the First Amendment or Equal Protection Clause of the Fourteenth Amendment.

### G. Definitions

#### 1. *sexually oriented*

Chapter 6.54.010(X) defines "sexually oriented" as:

> any exhibition of any motion pictures, films or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."[23]

Plaintiffs' exhibit 5.

---

[23] Chapter 6.54.010(BB) defines "specified sexual activities" as: "(1) human genitals in a state of sexual stimulation or arousal; (2) acts of human masturbation, sexual intercourse, or sodomy; (3) fondling or erotic touching of human genitals, pubic region, buttock, or female breasts." Chapter 6.54.101(AA) defines "specified anatomical areas" as "(1) less than completely and opaquely covered: a. human genitals, pubic region, b. buttocks, c. female breasts below a point immediately above the top of the areola; and (2) human male genitals in a discernibly turgid state, even if completely opaquely covered." Plaintiffs' exhibit 5.

The plaintiffs contend that this definition is vague and overbroad as it potentially applies to a vast range of expression and entertainment that do not cause the type of secondary effects at which the ordinance is aimed.

The Court agrees that the term "sexually oriented" is overbroad as it could apply to the exhibition of any film, video, or movie, even if it were not the type typically considered to be adult oriented, providing that it depicts "[l]ess than completely and opaquely covered" buttocks or female breasts as stated in Chapter 6.54.010(AA). Therefore, this definition does not limit sexually oriented films, videos, or movies to those which are distinguished by their emphasis on such depictions. Under this definition, PG or R-rated movies containing such depictions could also fall within the purview of the statute despite the fact that they are not the type of movies that cause the kind of secondary effects at which Chapter 6.54 is aimed. Consequently, the definition of "sexually oriented" "reaches a substantial number of impermissible applications." *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d. at 1132. Accordingly, the Court finds that the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented" in Chapter 6.54.010(X).

### 2. *sexually oriented bookstore and sexually oriented video store*

A "sexually oriented bookstore" is defined in Chapter 6.54.010(Y)(1) as:

> an establishment having a *majority of its stock in trade or a majority of its floor space* in books, magazines, other periodicals, or any other items which are *distinguished or characterized by their*

> *emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

Plaintiffs' exhibit 5. (emphasis added).

Chapter 6.54.010(Y)(4) defines sexually "oriented video store" as:

> a commercial establishment having *a majority of its stock or a majority of its floor space* dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are *distinguished or characterized by an emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observance by patrons therein.

*Id.* (emphasis added).

The plaintiffs assert that these definitions are unconstitutionally vague because the phrase "majority of stock" and "majority of its floor space" is vague.

In *Richland Bookmart*, the Sixth Circuit considered a vagueness challenge to a regulation of sexually oriented bookstores that defined the bookstores as those having their "principal or predominant stock or trade" in sexually oriented materials, devices or paraphernalia. *Richland Bookmart*, 137 F.3d at 441. The Court rejected this challenge, finding that terms used in the definition were "understandable common terms." *Id.*

Likewise, the Court finds that the terms "majority of stock" and "majority of its floor space" are sufficiently clear to provide notice to bookstores and video stores that fall within the purview of the ordinance. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their vagueness challenge to the definitions of "sexually oriented bookstore" and "sexually oriented video store."

The plaintiffs also challenge these definitions as overbroad. In order to fall under the definition of a "sexually oriented bookstore," a store must have a majority of its stock in materials "distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.'" Chapter 6.54.010(Y). Additionally, in order to fall under the definition of a "sexually oriented video store," a store must have a majority of its stock of floor space in "sexually oriented videos." Such videos are narrowly defined in Chapter 6.54.010(Y)(4)(a) as those with a cover that depicts "specified sexual activities" or "specified anatomical areas." Accordingly, the Court finds that the plaintiffs are not likely to succeed on their claim that the definitions of "sexually oriented bookstore" and "sexually oriented video store" are overbroad.

Chapter 6.54.010(Y)(2) defines "sexually oriented nightclub" to mean:

> a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which *regularly* features live performances that are *characterized* by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

Plaintiffs' exhibit 5 (emphasis added).

Chapter 6.54.010(Y)(3) defines "sexually oriented theater" to mean:

> an enclosed building *regularly* used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material *depicting, describing or relating* to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

*Id.* (emphasis added).

Chapter 6.54.010(Z) defines "sexually oriented entertainment" to mean:

> the *regular* presentation, for a fee or incidentally [sic] to another service, of material or exhibitions *distinguished or characterized by an emphasis* on matter depicting or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

*Id.* (emphasis added).

The plaintiffs contend that the definitions of "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented entertainment," are impermissibly vague in that there is no limitation on the scope of the interpretation of the term "regularly" featured, used, or presented.

The Court finds that there is no "real and substantial ambiguity" in the term "regular." *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1210 (5th Cir. 1982) (denying the plaintiff's vagueness challenge to a city zoning ordinance which restricted the operation of adult theaters on the basis that it was unclear what it meant to show adult films on a "regular basis"). In the case of *FW/PBS*, an ordinance regulated adult theaters and cabarets that regularly provided nudity, sexually explicit depictions, or descriptions. *FW/PBS*, 493 U.S. at 254, 110 S.Ct. at 619-20, 107 L.Ed.2d at 636-37. The plaintiffs challenged the term "regularly" as vague. Justice Scalia concluded that the term "regularly" in this context "can reasonably be interpreted to mean a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise." *Id.*, (Scalia, J., concurring in part and dissenting in part). The same is true with respect to the term "regularly" as it is used in Chapter 6.54. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their challenge to the terms "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented entertainment" on the basis that the term "regularly" is vague.

Further, the plaintiffs contend that as the terms "sexually oriented nightclubs," "sexually oriented entertainment" and "sexually oriented theater" are overbroad as they are defined in the ordinance. The Court finds that, because the terms "sexually oriented nightclubs" and "sexually oriented entertainment" are limited to those that have regular presentations or performances characterized or distinguished by the inclusion of "specified sexual activities" or the exposure of "specified anatomical areas," the plaintiffs are not likely to succeed on their challenge that these definitions are overbroad.

However, the definition of "sexually oriented theater" could include those theaters which regularly present films, motion pictures, and videocassettes which merely depict "specified sexual activities" or "specified anatomical areas." It does not limit the theaters to those that show films, motions pictures, and videocassettes that are distinguished or characterized by such depictions. Consequently, this definition includes a vast number of theaters which show, for instance, PG or R-rated movies containing such depictions, but which would not cause the kinds of secondary effects at which Chapter 6.54 is aimed. Therefore, the definition of "sexually oriented theater" "reaches a substantial number of impermissible applications." *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132. Accordingly, the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented theater" in Chapter 6.54.010(Y)(2).

### H. Booth Regulation

Chapter 6.54.050 of the ordinance sets forth certain construction standards and regulatory provisions concerning any "booth" for the "viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos." Plaintiffs' exhibit 5. The plaintiffs contend that the booth regulations are overbroad because they apply to businesses and forms of entertainment that do not cause the types of secondary effects at which Chapter 6.54 is aimed.

The term "sexually oriented video" has been narrowly defined as those that depict specified sexually activities or specified anatomical areas on its cover. Therefore, the definition of "sexually oriented video" does not reach a "substantial number of impermissible applications." *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed 2d at 1132. As set forth above, the term "sexually oriented" is substantially overbroad as it applies to films and movies. However, the plaintiffs have not established that there are a substantial number of circumstances in which films and movies to which the term "sexually oriented" impermissibly applies are shown in the types of booths that Chapter 6.54 seeks to regulate. Therefore, the plaintiffs have not established that the booth requirement is overbroad because it "reaches a substantial number of impermissible applications." *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on their overbreath challenge to the booth requirements in Chapter 6.54.050.

### I. Revocation and Suspension Provisions

Chapter 6.54.150(A)(9) states that the board shall revoke a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54." Plaintiffs' exhibit 5. Chapter 6.54.150(B)(1) states that the board shall either fine, suspend or fine and suspend a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030." *Id.*

The plaintiffs contend that this provision is impermissibly vague because it does not provide sufficient guidance as to what constitutes a "sanitary and safe condition." The Court finds that in order for the board to revoke, suspend, and/or fine a licensee under these sections, the licensee must be in violation of Chapter 6.54, Metropolitan Code § 7.24.030, or Tennessee Code Annotated, § 57-4-204. Because the Metropolitan Code, § 7.24.030, Tennessee Code Annotated, § 57-4-204, and Chapter 6.54, all contain standards for determining whether a business is in compliance with them, the Court finds that the plaintiffs are not likely to succeed on their challenge to Chapters 6.54.150(A)(9) and 6.54.150(B)(1) as, impermissibly vague.

### J. Severability

Chapter 6.54.170 states:

> Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter.

Plaintiffs' exhibit 5.

When legislation contains a severance clause, "[i]t is the duty of the courts to give effect to a severability clause and to make an elision, so as not to invalidate an entire act" "unless observance thereof would frustrate the dominant legislative intent." *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975) (citations omitted). Moreover, if severing the unconstitutional provisions of an act would cause it to be essentially meaningless, the Court should not give effect to the severability clause. *Ellwest*, 718 F. Supp. at 1581.

## IV.

As set forth above, the Court finds that the plaintiffs have made the required showing of a substantial likelihood of success on the merits that numerous provisions of Chapter 6.54 are unconstitutional as violations of the First or Fourteenth Amendments to the United States Constitution. If the Court were to give effect to the severability clause, the remaining provisions would frustrate the dominant legislative intent of the ordinance. Accordingly, a preliminary injunction will issue against the defendants. The defendants shall be enjoined from enforcing Chapter 6.54, in its entirety, pending the adjudication of these cases on the merits and entry of a final judgment.

An appropriate order shall be entered.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Court
10-1-99/

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al. ]
]
v. ] No. 3-97-1066
METROPOLITAN GOVERNMENT OF ] No. 3-97-1176
NASHVILLE AND DAVIDSON ] Judge Higgins
COUNTY, TENNESSEE, et al. ]

## ORDER

In accordance with the memorandum contemporaneously entered, the plaintiffs' motions (filed December 17, 1998; Docket Entry Nos., 81 and 83) for a preliminary injunction are granted.[1]

Accordingly, the defendants are enjoined from enforcing Chapter 6.54 of the Metropolitan Code, pending the adjudication of these cases on the merits and entry of a final judgment.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Court
10-1-99/

---

[1] The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) is granted insofar as the notice relates to the plaintiffs' second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. However, the plaintiffs' motion is denied in all other respects.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al. ]
]
]
]
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE et al. ]

No. 3-97-1066
No. 3-97-1176
Judge Higgins

## ORDER

(Entered December 23, 1999)

In this action, as stated on the record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been granted by the preliminary injunction.[1,2]

The preliminary injunction heretofore issued is herewith made a permanent injunction.

Accordingly, the defendants are permanently enjoined from enforcing Chapter 6.54 of the Metropolitan Code.

The applications for interim attorneys' fees shall be deemed final applications for fees in favor of the prevailing

---

[1] See memorandum and order (entered October 4, 1999; Docket Entry Nos. 188-189) granting motions for preliminary injunction.

[2] There is no claim by the plaintiffs for money damages under 42 U.S.C. § 1983. Applications for interim attorneys' fees are now pending before the Magistrate Judge.

parties as of the conclusion of this litigation by the entry of this order.

The entry of this order shall constitute the final judgment in this action.[3]

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District
Judge 12-21-99

---

[3] The plaintiffs' motion to show cause (filed June 15, 1999; Docket Entry No. 167) is denied in its entirety. The defendants' motion (filed July 2, 1999; docket Entry No. 175) to strike is denied as moot. The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike is denied as moot.

UNITED STATES DISTRICT COURT MIDDLE
DISTRICT OF TENNESSEE NASHVILLE DIVISION

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, INC.,<br>et al.<br>v.<br>THE METROPOLITAN<br>GOVERNMENT OF NASHVILLE<br>AND DAVIDSON COUNTY,<br>TENNESSEE, et al. | ]<br>]<br>]<br>]<br>]<br>]<br>]<br>]<br>] | No. 3-97-1066<br>No. 3-97-1176<br>Judge Higgins |

## ORDER

(Filed May 26, 2000)

The defendants' motion[4] (filed May 5, 2000; Docket Entry No. 224) to vacate or dissolve injunction under Rule 60(b) is denied because the Court is without jurisdiction in view of the filing of a notice of appeal.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
5-23-00

---

[4] *See also* the defendants' memorandum (Docket Entry No. 225) in support of the motion and plaintiffs' response (Docket Entry No. 226) in opposition to the motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, et al. | ) | |
| v. | ) | NO. 3:97-1066<br>JUDGE CAMPBELL<br>CONSOLIDATED CASES |
| METROPOLITAN GOVERNMENT of NASHVILLE/ DAVIDSON COUNTY | ) | |

## ORDER

(Entered April 4, 2005)

Pending before the Court, among other things, is Plaintiffs' Motion for Oral Argument on Defendant's Motion to Dissolve Injunction (Docket No. 301). Plaintiffs' Motion is GRANTED, and the Court will hear oral argument on Defendant's Motion to Dissolve Injunction (Docket No. 294) on Friday, April 8, 2005, at 9:00 a.m.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, )
et al. )
 ) NO. 3:97-1066
v. ) JUDGE CAMPBELL
 ) CONSOLIDATED CASES
METROPOLITAN GOV- )
ERNMENT of NASHVILLE/ )
DAVIDSON COUNTY )

# ORDER

(Entered April 5, 2005)

Pending before the Court, among other things, is Defendant's Motion to Continue Hearing and Motion for Leave to File a Reply. Defendant's Motion is GRANTED in part and DENIED in part.

The hearing previously set for Friday, April 8, 2005, at 9:00 a.m. is canceled.

Defendant shall file its Reply Brief on or before April 22, 2005. No further briefing will be allowed, absent leave of the Court.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, et al.<br>v.<br>METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY | ) | NO. 3:97-1066<br>JUDGE CAMPBELL<br>CONSOLIDATED CASES |

## ORDER

(Entered April 27, 2005)

Pending before the Court is a Motion to Dissolve the Injunction (Docket No. 294), filed by the Metropolitan Government of Nashville and Davidson County ("Metro"). Plaintiffs have filed a Response (Docket No. 305) in opposition.

Metro's Motion is GRANTED, and the injunction previously entered in this case (Docket No. 199) is dissolved.

Pursuant to request from Metro, the effective date of this Order shall be August 1, 2005, in order to allow sexually oriented businesses and entertainers sufficient time to comply with the requirements of Chapter 6.54 of the Metropolitan Code of Laws.

All matters having been ruled upon, the case is dismissed and the Clerk is directed to close the file.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

---

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, et al. | ) | |
| v. | ) | NO. 3:97-1066<br>JUDGE CAMPBELL<br>CONSOLIDATED CASES |
| METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY | ) | |

## MEMORANDUM

(Entered April 27, 2005)

Pending before the Court is a Motion to Dissolve Injunction (Docket No. 294), filed by the Metropolitan Government of Nashville and Davidson County ("Metro"). Plaintiffs have filed a Response (Docket No. 305) in opposition. For the reasons stated herein, the Motion is GRANTED.

Metro seeks to dissolve an injunction issued on December 23, 1999, enjoining enforcement of Chapter 6.54 of the Metropolitan Code of Laws. Docket No. 189. Metro has presented evidence that both the facts and the law have changed since entry of that injunction, justifying its dissolution.

The Order enjoining the ordinance at issue was appealed to the Sixth Circuit Court of Appeals, which, in a published opinion, affirmed it in part and reversed it in part. Relevant to the decision on Metro's Motion to Dissolve Injunction, the Sixth Circuit held: "Upon remand, the district court should maintain the injunction until

Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected." *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County, Tennessee,* 274 F.3d 377, 403 (6th Cir. 2001).[1] The issue before this Court is whether Metro has made a satisfactory showing in that regard. After remand from the Sixth Circuit, this case was reassigned to the undersigned District Judge by Order (Docket No. 251) entered on May 16, 2002.

## DEFINITION OF "SEXUALLY ORIENTED"

With regard to the definition of "sexually oriented" found to be unconstitutional, Metro has presented evidence that the ordinance has been amended to eliminate the potential overbreath found to be unconstitutional by the Sixth Circuit. The current ordinance defines "sexually oriented" as follows:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

---

[1] This dictate from the Sixth Circuit makes Plaintiffs' Rule 60 argument meritless.

Metro Code of Laws, § 6.54.010(Y) (attached to Docket No. 294 as Ex. A).

The Sixth Circuit found the former definition of "sexually oriented" to be overbroad because it could apply to a range of expression that does not cause the secondary effects that the ordinance was aimed to prevent. *Deja Vu*, 274 F.3d at 388. A law is overbroad under the First Amendment if it reaches a substantial number of impermissible applications relative to the law's legitimate sweep. *Id.* at 387.

This Court finds that the amended definition is not overbroad and complies with the First Amendment. It no longer applies to just *any* film, movie, motion picture, etc., but rather only to those which "regularly depict material which is distinguished or characterized by an emphasis on matter depicting or describing 'specified sexual activities or specified anatomical areas' offered for observation by the patron(s) on the premises of a sexually oriented business."

The Court further finds that the amended definition has eliminated the potential for reaching a substantial number of impermissible applications by its restrictions that the subject media be "on the premises of a sexually oriented business," and "regularly depict" material with "an emphasis on" the specified sexual activities or specified anatomical areas defined elsewhere in the ordinance.

For these reasons, Metro has satisfied the Court that the constitutional problems with the ordinance's definition of "sexually oriented" have been corrected.[2]

## JUDICIAL REVIEW PROCEDURES

As for the sufficiency of its judicial review procedures, Metro argues both that the judicial review procedures have been changed and that the law as to what is required has changed.

The Sixth Circuit found that the judicial review procedures in effect at the time of the injunction provided no assurance of prompt judicial review because there was no affirmative evidence showing that every writ of certiorari would be granted. *Deja Vu,* 274 F.3d at 402. The court held that because the ordinance's judicial review procedures did not guarantee prompt judicial review as required by the First Amendment, those procedures were facially[3] unconstitutional. *Id.* at 402-403.

The judicial review procedures provided by Tennessee law have since changed. The relevant statute now provides:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the

---

[2] The Sixth Circuit also noted that the phrase "sexually oriented" is "never used but in conjunction with some other word that has its own definition" and is "apparently meaningless." *Deja Vu,* 274 F.3d at 389. Thus, "sexually oriented" can "easily be severed" in any event. *Id.*

[3] Plaintiffs' assertion that the constitutionality of the ordinance herein was decided on a case-by-case basis is wrong.

> respondent requests an expedited hearing, the court *shall immediately grant* the writ of certiorari, and *shall hear the matter and issue its decision* within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e) (emphasis added).

The Court finds that this amended, mandatory[4] language does guarantee prompt judicial review as required by the First Amendment. The statute is sufficient "affirmative evidence" that every writ of certiorari concerning protected speech will be granted. Accordingly, Metro has satisfied this Court that the constitutional problems with its judicial review procedures have been corrected.[5]

Even if the amended ordinance did not specifically guarantee prompt judicial review, which it does, Metro argues that it is sufficient to withstand constitutional muster under the recent case of *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 124 S.Ct. 2219 (2004). In that case, the Supreme Court held that Colorado's ordinary judicial review procedures suffice to protect First Amendment judicial review rights, so long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. *Id.* at 2224. Specifically, the Court stated "we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First

---

[4] Plaintiffs' contention that the statute is discretionary has no merit.

[5] It is also clear that the statute was amended specifically to comply with the Sixth Circuit's opinion in this case, as reflected in 2002 Pub. Acts, c. 615, § 2 regarding the effective date.

Amendment harm. We presume that courts are aware of the constitutional need to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech.'" *Id.* at 2225.[6]

In addition, the Supreme Court held that where the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria[7] and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision in the first place. *Id.* at 2226. The Court need not decide whether *Z.J. Gifts* dictates the result in this case, since the amended ordinance guarantees prompt judicial review.

For these reasons, the Court is satisfied that the previously-determined unconstitutional deficiencies in Metro's judicial review procedures in this case have been corrected, and that the amended statute provides the required First Amendment protections. Metro's Motion to Dissolve the Injunction is GRANTED.

## FURTHER LITIGATION

Plaintiffs argue that dissolution of the injunction should not end this litigation because the injunction hearing was never consolidated with a trial on the merits.

---

[6] "Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require." *Z.J. Gifts* at 2226. Metro argues the same presumption should be afforded Tennessee's rules and courts.

[7] The Court does not use the words "objective" or "subjective" as suggested by the Plaintiffs.

Judge Higgins' Order of December 23, 1999, provides otherwise. That Order states:

> In this action, as stated on the record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been granted by the preliminary injunction.
>
> The preliminary injunction heretofore issued is herewith made a permanent injunction.
>
> . . .
>
> The entry of this order shall constitute the final judgment in this action.

Docket No.199.

In addition, as Metro points out, Magistrate Griffin specifically ordered the Plaintiffs to file (within ten days of any order granting Defendants' prior Motion to Dissolve Preliminary Injunction) a supplemental motion for preliminary injunction, "in which all issues upon which the plaintiffs relies (sic) in this case shall be raised. In other words, the plaintiffs shall not piecemeal motions for preliminary injunction but shall raise all grounds in support of a motion for preliminary injunction at one time." Docket No. 61. That "supplemental" motion (Docket No. 83) was granted by Judge Higgins (Docket No. 188), appealed to the Sixth Circuit (Docket No. 208), affirmed in part and reversed in part (274 F.3d. 377), and is the subject of the pending Motion to Dissolve Injunction. All issues upon which the Plaintiffs rely in this case should have been raised.[8] Indeed, the Sixth Circuit found that Plaintiffs raised "all of their constitutional challenges to the Ordinance." *Deja Vu,* 274 F.3d at 386.[9]

TODD J. CAMPBELL

---

[8] The Court cannot and will not revisit other substantive rulings previously made herein.

[9] Plaintiffs also argue there is a pending Motion for Review of the Magistrate Judge's Order. The only pending motion in this case is this Motion to Dissolve the Injunction. All other motions were termed when the judgment was made final (Docket No. 199) and appealed.

To the extent Plaintiffs seek to raise new matters arising after the Sixth Circuit's opinion, or related to new ordinance provisions, they should file a new case.

Plaintiffs also argue that various state constitutional issues are pending. The Court disagrees for the reasons stated above, but in any event declines supplemental jurisdiction over any state law claims. 28 U.S.C. § 1367(c).

Case No: 05-5895

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## ORDER

(Filed Nov. 3, 2006)

DEJA VU OF NASHVILLE, INC et al,

Plaintiffs-Appellants

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

Defendant-Appellee

BEFORE: MARTIN, MOORE, and ROGERS, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellants,

And further considering the amended opinion entered by this Court on October 12, 2006,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

**ENTERED BY ORDER**
**OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED

No. 2 061078 JAN 31 2007

OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

◆

DEJA VU OF NASHVILLE, INC., a Tennessee corporation,
and MERONEY ENTERTAINMENT, INC.,
a Tennessee corporation,

*Petitioners,*

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, TENNESSEE,

*Respondent.*

◆

**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Sixth Circuit**

◆

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II, PAGES 218 TO 476

◆

BRADLEY J. SHAFER
*(Counsel of Record)*
ANDREA E. PRITZLAFF
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
517-886-6560
*Counsels for Petitioners*

MICHAEL F. PLEASANTS
PLEASANTS LAW FIRM
8 South Third, Suite 200
Memphis, Tennessee 38103
901-572-7332
*Co-Counsel for Petitioners*

January 31, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

# INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI*

## Volume I

Page

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, 466 F.3d 391 (6th Cir. 2006); Amended Opinion and Judgment, Filed October 12, 2006 .......... App. 1

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States Court of Appeals for the Sixth Circuit, Case No. 05-5895, Opinion, Filed June 22, 2006 .......... App. 16

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001), Opinion, Filed December 6, 2001 ... App. 30

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Memorandum and Order granting motion for preliminary injunction, Filed December 8, 1997 .......... App. 78

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Case Management Order, Filed March 5, 1998 .......... App. 99

---

* Any typographical and/or incorrect punctuation found in the following pages were intentionally left to show accurately how the original documents appeared.

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order regarding Case Management Order, Filed March 6, 1998 ........... App. 105

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order regarding discovery deadlines, Filed September 16 1998 ............. App. 108

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order and Memorandum regarding motion for protective order, Filed October 22, 1998 .......... App. 111

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order regarding deadlines, Filed October 30, 1998 .......... App. 128

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Memorandum and Order dissolving preliminary injunction, Filed December 3, 1998 .......... App. 131

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Memorandum and Order granting second motion for preliminary injunction, Filed October 4, 1999 .......................App. 149

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order converting preliminary injunction into permanent injunction, Filed December 23, 1999 ....................................App. 202

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order denying motion to vacate or dissolve the injunction, Filed May 26, 2000 ..............................................................App. 204

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order granting motion for oral argument, Filed April 4, 2005 ................App. 205

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order granting motion for leave to file a reply, Filed April 5, 2005.........App. 206

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Order and Memorandum granting motion to dissolve, Filed April 27, 2005 .......... App. 207

*Deja Vu of Nashville, Inc. et al. v. Metropolitan Gov't of Nashville/Davidson County*, United States Court of Appeals for the Sixth Circuit, Case No. 05-5895, Order denying petition for rehearing, Filed November 3, 2006 .......... App. 217

Volume II

The First Amendment to the United States Constitution .......... App. 218

The Fourteenth Amendment to the United States Constitution .......... App. 219

42 United States Code Annotated §1983 – Civil Action for Deprivation of Rights .......... App. 221

Tennessee Code Annotated §27-9-111 (1998) .......... App. 222

Tennessee Code Annotated §27-9-111 (2002) – With Historical and Statutory Notes .......... App. 224

Metropolitan Government of Nashville and Davidson County Bill No. 097-796 (Original Bill), Approved August 25, 1997 .......... App. 226

Recodified Version of Chapter 6.54 .......... App. 292

INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

Excerpts of Verified Complaint for Preliminary Injunction, Permanent Injunction, and Declaratory Judgment, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed October 17, 1997 ........ App. 352

Excerpt of Transcript of Proceedings for hearing on January 27, 1999, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed January 27, 1999 ........ App. 356

Table of Contents of Brief in Support of Plaintiffs' Second Motion for Preliminary Injunction, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066 ........ App. 366

Notice of Depositions of Representatives of the Metropolitan Government of Nashville and Davidson County, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Dated August 28, 1998 ........ App. 374

Request for Production of Documents by Plaintiffs to Defendants, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed April 24, 1998 ........ App. 382

Excerpts of Transcript of April 27, 1999 Metropolitan Adult Entertainment Board Hearing ........ App. 390

Excerpt of Transcript of Proceedings for Preliminary Injunction hearing on April 15, 1999, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed April 15, 1999 ........ App. 402

INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

Excerpts of Transcript of May 11, 1999 Metropolitan Adult Entertainment Board Hearing ........... App. 410

Excerpts of Transcript of May 25, 1999 Metropolitan Adult Entertainment Board Hearing ........... App. 413

Metropolitan Sexually Oriented Business Licensing Board Letter Regarding Denial of Deja Vu of Nashville's License Application, dated May 26, 1999 ........... App. 420

Excerpt of Transcript of Proceedings for Case Management Conference on December 21, 1999, United States District Court for the Middle District of Tennessee, Case No. 3:97-1066, Filed January 14, 2000 ........... App. 422

Notice of Deposition of Representatives of the City of Milford, Connecticut, *Sidepockets, Inc. v. City ofMilford, Connecticut*, United States District Court for the District of Connecticut, Case No. 3:03-cv-02134-AWT, Filed February 17, 2005 .... App. 438

Excerpt of Transcript of Telephonic Status Conference, *Sidepockets, Inc. v. City of Milford, Connecticut*, United States District Court for the District of Connecticut, Case No. 3:03-cv-02134-AWT, Filed October 30, 2006 ........... App. 444

Order re motion for clarification, *Sidepockets, Inc. v. City of Milford, Connecticut*, United States District Court for the District of Connecticut, Case No. 3:03-cv-02134-AWT, Filed October 30, 2006 ........... App. 449

## INDEX TO APPENDIX TO DEJA VU OF NASHVILLE, INC.'S PETITION FOR A WRIT OF CERTIORARI – Continued

Page

Memorandum of David Bugher Community Development Director for the City of Lakewood, Washington, to Daniel Held, City Attorney for the City of Lakewood, Washington, *Byran Clark v. City of Lakewood*, Case No. C98-5341 RJB (W.D. Wash.) .......... App. 451

Order regarding motion for summary judgment, *Flanigan's Enterprises, Inc., et al. v. Fulton County*, United States District Court for the Northern District of Georgia, Case No. 1:01-CV-3109-RLV, Filed April 7, 2004 .......... App. 452

Order regarding discovery, *D. Russo, Inc. v. Township of Union, New Jersey*, Superior Court of New Jersey Law Division: Union County, Docket No. UNN-L-2313-06, Filed September 19, 2006 .......... App. 460

Order regarding motion for protective order, *High Five Investments, LLC v. Floyd County*, United States District Court for the Northern District of Georgia, Case No. 4:06-CV-0190-HLM, Filed January 10, 2007 .......... App. 463

Plaintiff-Intervenor Reliable Consultants, Inc. d/b/a Dreamer's' Brief in Support of Motion in Limine, *Reliable Consultants, Inc. v. City of Kennedale*, United States District Court for the Northern District of Texas, Case No. 4:02-CV-0458-Y, Filed June 18, 2004 .......... App. 469

## THE FIRST AMENDMENT
## TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

## THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

**42 U.S.C. § 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## State of Tennessee

PUBLIC CHAPTER NO. 794

## HOUSE BILL NO. 2926

**By Representatives Robinson, Buck**

**Substituted for: Senate Bill No. 2634**

**By Senator Haynes**

AN ACT to amend Tennessee Code Annotated, Section 27-9-111, relative to judicial review of certain final orders or judgments of a board or commission by requiring the hearing and adjudication of the cases within a specified period.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 27-9-111, is amended by adding the following language as a new, appropriately designated subsection:

> ( ) if the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct, protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven (7) days of the grant of the writ of certiorari.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

HOUSE BILL NO. 2926

PASSED: April 9, 1998

/s/ Jimmy Naifeh
JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES
/s/ John S. Wilder
JOHN S. WILDER
SPEAKER OF THE SENATE

APPROVED this 23rd day of April 1998

/s/ Don Sundquist
DON SUNDQUIST, GOVERNOR

## T.C.A. § 27-9-111 (2002). Hearings; findings

(a) At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue.

(b) The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce.

(c) The judge shall reduce all findings of fact and conclusions of law to writing and make them parts of the record.

(d) In making such findings of fact, the judge shall weigh the evidence and determine the facts by the preponderance of the proof.

(e) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in § 27-9-109 within seven (7) days of the grant of the writ of certiorari.

1951 Pub.Acts, c. 261, § 1; 1987 Pub.Acts, c. 28, §§ 1 to 3; 1998 Pub.Acts, c. 794, § 1, eff. April 23, 1998. Amended by 2002 Pub.Acts, c. 615, § 1.

**Formerly** 1932 Code, § 9014; § 27-911.

HISTORICAL AND STATUTORY NOTES

2002 Pub.Acts, c. 615, § 1, deleted the first sentence of subsec. (e), which formerly read: "If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution if the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari" and replaced it with the language "If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari."

2002 Pub.Acts, c. 615, § 2, provides:

"This act shall not take effect until such time as the United States Supreme Court has denied the petition for a writ of certiorari filed by the Metropolitan Government of Nashville and Davidson County in the case of Deja vu, Inc. v Metropolitan Government, 274 F.3d 377 (6th Cir. 2001), or if the United States Supreme Court grants a writ of certiorari, this act shall not take effect until such time as the United States Supreme Court affirms the Sixth Circuit's opinion on the issue of 'prompt judicial review.' If the United States Supreme Court reverses the Sixth Circuit's opinion on 'prompt judicial review' this act shall never take effect."

## BILL NO. O97-796

## AN ORDINANCE AMENDING TITLE 6 OF THE METROPOLITAN CODE OF LAWS BY ADDING A NEW CHAPTER 6.54, LICENSING AND REGULATION OF ADULT ENTERTAINMENT AND ADULT BUSINESSES.

WHEREAS, the Metropolitan County Council of the Metropolitan Government of Nashville and Davidson County ("Metropolitan Council") may, pursuant to Section 2.01(40) of its Charter and the general laws of the State of Tennessee, enact regulatory ordinances protecting and promoting the general welfare, health, and safety of its citizens; and,

WHEREAS, the Metropolitan Council has previously enacted Sections 17.12.080(29), 17.60.020(C)(1), and 17.64.270 of the MCL which regulate the location of sexually oriented businesses; and,

WHEREAS, since the adoption of the above-referenced ordinances, the Metropolitan Council has received and considered reports and recommendations from employees, citizens, other local governments, and other reputable sources and has determined that locational criteria alone do not adequately protect the health and general welfare of the people of Metropolitan Nashville Davidson County, and,

WHEREAS, the Metropolitan Council has determined that permitting and/or licensing is a legitimate and reasonable means of accountability to ensure that operators of adult entertainment establishments comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places for illegal sexual activity or solicitation; and, WHEREAS, it is not the Intent of this ordinance to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance which addresses the secondary effects of adult entertainment establishments; and,

WHEREAS, it is not the intent of the Metropolitan Council to condone or legitimize the distribution of obscene materials, and the Metropolitan Council recognizes that state and federal law prohibits the distribution of obscene materials and expects and encourages state and federal enforcement officials to enforce state and federal obscenity statutes against any such illegal activities in Metropolitan Davidson County; and,

WHEREAS, the locational requirements of the Adult Entertainment Zoning Ordinance are unaffected by the following amendment.

WHEREAS, the Metropolitan Council desires to amend the Code of Laws of the Metropolitan Government of Nashville and Davidson County ("MCL") to regulate adult entertainment establishments in order to promote and secure the general welfare, health, and safety of the citizens of Metropolitan Nashville and Davidson County.

NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY.

*SECTION 1. Purpose and Findings.*

(A.) *PURPOSE*. It is the purpose of this ordinance to regulate adult entertainment establishments to promote the health, safety, morals, and general welfare of the citizens of Metropolitan Nashville Davidson County. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials or entertainment. Similarly, it is not the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented materials or entertainment to their intended market.

(B.) *FINDINGS.* Based on evidence concerning the adverse secondary effects of adult uses on the community presented in hearings and reports made available to the Metropolitan Council, and on findings incorporated in the *DLS d/b/a Diamonds and Lace Showbar v. The City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997); *DLS, Inc d/b/a Diamonds and Lace Showbar v. City of Chattanooga*, 914 F.Supp. 193 (E.D. Tenn. 1995); *DLS, Inc d/b/a Diamonds and Lace Showbar v City of Chattanooga*, 894 F.Supp. 1140 (E.D. Tenn. 1995); *City of Renton v. Playtime Theaters. Inc.*, 475 U.S. 41 (1986); *Coleman A. Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976); and studies and judicial opinions concerning the adverse secondary effects of adult uses on communities such as Austin, Amarillo, and Beaumont, Texas; Phoenix and Tucson, Arizona; Minnesota [see Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989)], Seattle, Washington; [*see Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978)]; and Houston, Texas; [see *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); as well as newspaper articles [*see Peep Shows Role Unregulated* (*Tennessean*, April 8, 1991)] reports from the Police Department and reports from the Department of Health of the Metropolitan Government of Nashville and Davidson County, the Metropolitan Council finds:

1. Unlawful and unhealthy activities that are occurring within adult entertainment establishments are presently uncontrolled by the operators of these establishments and, there is presently no mechanism to control the unhealthy and unlawful activities that are occurring within these establishments or to make the owners and operators of these establishments responsible for the activities that occur on their premises.

2. Certain employees of adult entertainment establishments in Davidson County engage in a higher incidence of certain types sexually oriented criminal activity, unhealthy and illegal sexual contact, and other unlawful activities at these businesses than employees of other establishments

3 Sexual acts, including homosexual and heterosexual masturbatory acts and oral and anal sex acts, are a regular occurrence at adult entertainment establishments in Davidson County, especially those establishments where there are private or semi-private booths or cubicles for viewing films, videos, or live sex shows.

4. Offering and providing such space, areas and rooms where such activities take place creates conditions that generate prostitution and other crimes, as well as unhealthy conditions.

5. Persons frequent certain adult theaters, adult bookstores, and adult video stores for the purpose of providing sex within the premises of such adult theaters, adult bookstores, and adult video stores and patrons frequent certain adult theaters, adult bookstores, adult

nightclubs, and adult video stores for the purpose of procuring prostitutes.

6. At least fifty communicable diseases may be spread by activities currently occurring in adult entertainment establishments, including, but not limited to, syphilis, gonorrhea, human immuno-deficiency virus infection (HIV), genital herpes, hepatitis B, hepatitis Non A, hepatitis Non B, amebiasis, and shigella infections.

7. Since 1981 and to the present, there have been an increasing cumulative number of reported cases of acquired immuno-deficiency syndrome (AIDS) caused by the human immuno-deficiency virus (HIV) in the United States –

600 cases in 1982
2,200 in 1983
4,600 in 1984
8,555 in 1985
336,522 between 1986 and 1992
77,641 in 1993
68,959 in 1994
61,614 in 1995
and 36,693 cases in 1996;

and in Tennessee –

3 cases in 1982
7 in 1983
28 in 1984
70 in 1985
161 in 1986
345 in 1987
666 in 1988
1,012 in 1989
1,389 in 1990
1,820 in 1991
2,380 in 1992
1,308 in 1993
818 in 1994
1,018 in 1995
and 965 cases in 1996;

and in Davidson County –

187 cases in 1992
308 in 1993
177 in 1994
207 in 1995
153 in 1996.

8. As of February 28, 1993, there have been 2,521 reported cases of AIDS in Tennessee, with 1,502 deaths being reported. Of those 2,521 cases, 2,340 were males and 181 were females.

9. The number of cases of early syphilis in the United States has risen with

33,613 cases reported in 1982
32,698 in 1983
28,607 in 1984
27,131 in 1985
27,883 in 1986
35,147 in 1987
40,117 in 1988
44,540 in 1989
45,200 in 1990

10. The number of cases of early syphilis in Tennessee has grown with

1,150 in 1982
1,013 in 1983
1,014 in 1984
1,168 in 1985
1,160 in 1986
1,330 in 1987
1,910 in 1988
2,766 in 1989
1,989 in 1990
2,011 in 1991
2,786 in 1992
2572 in 1993
2312 in 1994
2,035 in 1995
and 1,807 in 1996

and in Davidson County syphilis cases reported annually have risen with 101 cases in 1982 –

104 in 1983
86 in 1984
52 in 1985
87 in 1986
173 in 1987
130 in 1988
211 in 1989
515 in 1990
437 in 1991
388 in 1992
149 in 1993
100 in 1994
194 in 1995
292 in 1996

11. The number of cases of gonorrhea in the United States reported annually remains at a high level, with 960,633 civilian cases reported in 1982 –

900,435 in 1983
878,556 in 1984
911,419 in 1985
900,868 in 1986
780,905 in 1987
719,536 in 1988
733,151 in 1989
and 611,932 through November 1990;

and in Tennessee –

32,444 in 1982
30,896 in 1983
30,749 in 1984
32,110 in 1985
26,455 in 1986
23,740 in 1987
19,336 in 1988
19,557 in 1989
56,763 through December 1992
14,285 in 1993
15,197 in 1994
13,894 in 1995
11,710 in 1996

12. The number of cases of gonorrhea reported annually in Davidson County remains at a high level, with –

5,325 in 1982
4,744 in 1983
5,294 in 1984
5,202 in 1985
4,731 in 1986
3,846 in 1987
3,815 in 1988
3,409 in 1989
2,966 in 1990
2,701 in 1991
2,390 in 1992
2,388 in 1993
3110 in 1994
2,622 in 1995
2,033 in 1996.

13. The Surgeon-General of the United States in his report of October 22, 1986, has advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug abuse, exposure to infected blood and blood components, and from an infected mother to her newborn.

14. According to the best scientific evidence, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts.

15. According to the best scientific evidence, numerous other diseases and infestations, including chlamydia, pelvic inflammatory disease, chancroid, herpes, hepatitis B, lympho-granuloma venereum, granuloma inguinale, genital warts, trichomomasis, scabies, pediculosis, amebiasis, giardiasis, and others are transmitted by sexual acts.

16. Conditions in some adult entertainment establishments are unsanitary and unhealthy, in part, because

the activities conducted there are unhealthy, and in part, because the owners and operators of the facilities fail to regulate the unhealthy and unsanitary activities and fail to maintain the facilities in a sanitary and healthy condition.

17. The United States Center for Disease Control has issued universal precautions, including housekeeping and disinfection guidelines, for the prevention of transmission of the HIV virus and other diseases. These guidelines should be followed anytime there is the potential for exposure to blood and other body fluids.

18. Staff members of the police and health departments have observed semen, blood, fecal matter and urine within the public areas of adult entertainment establishments in Davidson County. These unhealthy conditions are worse in areas within adult entertainment establishments where persons view sexually oriented films, sexually oriented movies, adult videos or witness sexually oriented live entertainment.

19 Permitting entertainers to be in close contact with patrons initiates the exchange of money which may reasonably be expected to serve as an opportunity to solicit for and an inducement to agree to unprotected and/or illegal sexual activity, including prostitution and thus poses a threat to both groups by promoting the spread of communicable diseases, and encouraging crime.

20. When the previously described activities characteristic of adult entertainment establishments are present within Davidson County, Tennessee, other activities which are illegal or unhealthy tend to accompany them, concentrate around them and be aggravated by them. Such other activities include, but are not limited to, prostitution,

pandering, solicitation for prostitution, lewd and lascivious behavior, exposing minors to harmful materials and possession, distribution and transportation of obscene materials.

21. The findings noted in paragraphs 1 through 20 raise substantial governmental concerns.

22. Adult entertainment establishments should be reasonably regulated in order to protect those substantial governmental concerns.

23. A reasonable licensure procedure is an appropriate and effective mechanism to place the burden of that reasonable regulation on the owners and operators of adult entertainment establishments. Further, such a licensing procedure will place a heretofore nonexistent incentive on the operator to see that the adult entertainment establishment is run in a manner that is consistent with the health, safety and welfare of its patrons and employees, as well as the citizens of Davidson County, Tennessee. It is appropriate to require reasonable assurances that the licensee is the actual operator of the adult entertainment establishments, fully in possession and control of the premises and the activities occurring therein.

24. Removal of doors on booths – wherein patrons view sexually oriented movies, sexually oriented films, adult videos, or sexually oriented live entertainment – and requiring sufficient lighting in premises with booths advances the substantial governmental interest of curbing the illegal and unsanitary sexual activity occurring at adult entertainment establishments

25 The prevention of sexual contact between patrons and employees at adult entertainment establishments is unrelated to the suppression of free expression, but serves to address the concerns raised in the findings contained herein.

26. Prohibiting dancers and patrons from engaging in sexual fondling and caressing in adult theaters or adult cabarets would reduce the opportunity for prostitution and thus should deter prostitution and other crimes of a sexual nature.

27. The disclosure of certain information by those persons ultimately responsible for the day-to-day operation and maintenance of an adult entertainment establishment is substantially related to the significant governmental interest of preventing the spread of sexually-transmitted diseases and reducing or eliminating the criminal activity associated with adult entertainment establishments.

28 It is desirable in the prevention of the spread of communicable diseases and in the investigation of criminal activity, to obtain a limited amount of information regarding certain operators and employees who either engage in the conduct which this ordinance is designed to prevent or are likely to be witnesses to such activity.

29. A substantial rational relationship between adult entertainment establishments and sexually related crimes establishes a compelling justification for barring those persons who have committed crimes from the management of such businesses.

30 The fact that an applicant for an adult use license has been convicted of a sexually-related crime leads to a

rational inference that the applicant is more likely to engage in conduct in contravention of this ordinance.

31. The barring of such individuals from management of adult uses for a period of years serves as a deterrent to and prevents the conduct which leads to the transmission of sexually transmitted diseases and to the promotion of that criminal activity associated with adult uses.

32. The general welfare, health, and safety of the citizens of Metropolitan Nashville and Davidson County will be promoted by the enactment of this ordinance.

*SECTION 2*: Title 6 of the Code of Laws of The Metropolitan Government of Nashville and Davidson County is amended by adding a new Chapter 6.54.

## 6.54 Licensing and Regulation of Adult Business:

### 6.54.010 Definitions.

A. Definitions

For the purpose of this chapter, the words and phrases used herein shall have the following meanings, unless otherwise clearly indicated by the context:

1. *Adult entertainment* means the regular presentation, for a fee or incidentally to another service, of material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation by patrons therein.

2. *Adult entertainment establishment* means any commercial establishment – including but

not limited to: "adult bookstore", "adult video store", "adult theater", "adult nightclub", sexual encounter center, massage parlor, rap parlor, lingerie modeling, or sauna – which for a fee or incidentally to another service, regularly presents material or exhibition distinguished or characterized by an emphasis on matters depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation by patrons therein. Adult entertainment establishment further means any commercial establishment to which the public patrons or members are invited or admitted and which are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing sexually oriented motion pictures, sexually-oriented movies, sexually oriented films, adult videos, or wherein an entertainer provides sexually oriented entertainment to a member of the public, a patron or a member.

(a) *Adult bookstore* means an establishment having any of its stock and trade in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation of the patrons therein, or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, adult videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

(b) *Sexually oriented* means any exhibition of any motion pictures, films, videos, or live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers which has a significant or substantial portion of such performance any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas".

(c) *Adult theater* means an enclosed building regularly used for presenting films, motion pictures, video cassettes, slides, or other photographic reproductions or other material depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined below, for observation by patrons therein.

(d) *Adult nightclub* means a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which regularly features live performances that are characterized by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined below.

(e) *Adult video store* means a commercial establishment having any stock in "adult videos" – as defined below – which are rented or sold and presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "adult videos", or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation by patrons therein.

(f) *Adult videos* means a-video, CD, laser disk, or similar medium with a cover that depicts "specified sexual activities" or "specified anatomical areas" or a transparent or less than opaque cover through which "specified sexual activities" or "specified anatomical areas" can be viewed.

3. *Aggravated rape* as defined in The Tennessee Code Annotated § 39-15-502.

4. *Aggravated sexual battery* as defined in The Tennessee Code Annotated § 39-15-504.

5 *Employee* means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of an adult entertainment establishment.

6 *Entertainer* means any person who provides live entertainment within an adult entertainment establishment as defined in this section, whether or not a fee is charged or accepted for entertainment and whether or not entertainment is provided as an employee or an independent contractor.

7. *Indecent exposure* as defined in The Tennessee Code Annotated § 39-15-511.

8. *Location* means a single site for which only one use and occupancy permit would be required

9 *The Metropolitan Area* – General services district of the Metropolitan Government of Nashville and Davidson County

10. *The Metropolitan Council* means the legislative body of The Metropolitan Government of Nashville and Davidson County, Tennessee

11. *Obscenity* as defined in The Tennessee Code Annotated § 39-17-901(10) through (14).

12. *Operator* means any person, partnership, or corporation operating, conducting or maintaining an adult entertainment establishment.

13. *Prostitution* as defined in The Tennessee Code Annotated § 39-13-512

14. *Patronizing prostitution* as defined in The Tennessee Code Annotated § 39-15-13-512.

15 *Promoting prostitution* as defined in The Tennessee Code Annotated § 39-15-13-512.

16 *Rape* as defined in The Tennessee Code Annotated § 39-15-503.

17. *Rape of a child* as defined in The Tennessee Code Annotated § 39-15-522

18. *Sexual battery* as defined in The Tennessee Code Annotated § 39-15-505.

19. *Sexual exploitation of a minor* as defined in The Tennessee Code Annotated § 39-17-1003, § 39-17-1004, and § 39-17-1005.

20. *Specified sexual activities* mean

    (a) Human genitals in a state of sexual stimulation or arousal;

    (b) Acts of human masturbation, sexual intercourse or sodomy;

(c) Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

21. *Specified anatomical areas* mean:

(a) Less than completely and opaquely covered:

(i) Human genitals, pubic region,

(ii) Buttocks;

(iii) Female breasts below a point immediately above the top of the areola; and

(b) Human male genitals in a discernibly turgid state, even if completely opaquely covered

22. *Statutory rape* as defined to The Tennessee Code Annotated § 39-15-506.

## **6.54.020 Adult Entertainment Licensing Board**

A. Establishment

An adult entertainment licensing board is hereby created and designated the metropolitan adult entertainment licensing board (herein "board").

B. Membership – Terms

1. The board shall consist of five members, who shall have been residents of the metropolitan area for not less than one year, and who shall continue to be eligible so long as they reside in the metropolitan area, to be appointed by the mayor and confirmed by a majority vote of the metropolitan council.

2. At least one of the five members shall be an attorney, and one of the five members shall be a health provider.

3. Of the five members first appointed, two shall be appointed for a term of two years, and two shall be appointed for a term of three years, and one shall be appointed for a term of four years. Thereafter, each member shall be appointed for a term of four years, and shall serve until his/her successor is appointed. Any vacancy other than the expiration of terms shall be filled for the un-expired term

C. Election of officers – Term

The board shall organize by the election of a chair and a vice-chair, who shall serve for a period of one year or until a successor shall have been chosen.

D. Meetings – Quorum required – Minutes and transcript

1. The board shall hold two regular meetings each month at a time fixed by the board, and may hold such special meetings as may be necessary

2. The attendance of at least a majority of the members of the board, not including unfilled positions, shall be required to constitute a quorum for the purpose of transacting business.

3. Minutes shall be kept of the meetings in permanent form and a record shall be kept of the action of the board with respect to every application for a license and/or a permit. The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits.

4 No transcript of the proceedings had before the board shall be in any form other than narrative

unless the board shall have been requested to provide for an exact copy of the testimony by an interested party at least twenty-four hours prior to a board meeting. The cost of an exact copy shall be borne by the person requesting the same.

E. Powers and duties.

1. The board shall have jurisdiction over the licensing, regulating and controlling of all adult entertainment establishments as provided herein, located in the metropolitan area.

2 The board may promulgate such bylaws, rules and regulations not inconsistent with state law, the metropolitan charter, or any ordinance, as it deems appropriate for the conducting of its business.

3. The board has the authority to subpoena witnesses to testify before the board

F. Inspectors – Authority.

The board is empowered to employ suitable person(s) as inspectors which inspectors shall not hold any service status. The board shall prescribe the duties of such inspectors so as to enforce the applicable provisions of this title.

G Procedures for Hearings

This section shall apply to all hearings by the board including but not limited to hearings for revocation suspension, or denial of a license/permit.

1 Upon receiving a written request for a hearing, the board shall send the party requesting the hearing a notice stating the time and place of the hearing and the right to be represented by counsel.

2. At the hearing, the party requesting the hearing shall appear on his/her own behalf or be represented by counsel. All witnesses shall be sworn. The chair shall allow the party requesting the hearing to present witnesses on his/her own behalf and to cross-examine all witnesses testifying against him/her.

3. All decisions of the board shall be in writing, setting forth the findings of the board, and shall be signed by the chair or vice-chair Any decisions of the board to deny a renewal, suspend, or revoke a license/permit shall not take effect earlier than ten (10) days after the date the decision was rendered to allow the effected party adequate time to seek judicial review.

4. Minutes shall be kept of all proceedings before the board in permanent form and a record shall be kept of the actions of the board with respect to all hearings.

5 A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. The record must be maintained by the board for a period of ninety days Such record or any part thereof shall be transcribed at the request of any party at such party's expense.

6. Any party desiring a court reporter to be present at the hearing must arrange for the court reporter to be present.

### 6.54.030 License Required.

A Except as provided in subsection F below, from and after the effective date of this ordinance, no adult entertainment establishment shall be operated or maintained within the metropolitan area without first obtaining a license to operate issued by the board.

B. Any person, partnership, or corporation which desires to operate more than one (1) adult entertainment establishment must have a license for each establishment

C. Only one license nay be issued for each adult entertainment establishment location.

D. No license or interest in a license may be transferred to any person, partnership or corporation.

E. It shall be unlawful for any entertainer or operator to work in or about, or to perform any service directly related to the operation of any unlicensed adult entertainment establishment. It shall be unlawful for any employee to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed adult entertainment establishment while adult entertainment is being presented.

F All existing adult entertainment establishments at the time of the passage of this ordinance must submit an application for a license within one hundred twenty (120) days of the effective date of this ordinance. If a license is not applied for within said one-hundred-twenty day period, then such existing adult entertainment establishment shall cease operations.

### 6.54.040 Application for license.

A. Application

1. Any person, partnership, corporation or any other entity desiring to secure a license shall make application to the board. The applicant shall file the original application with six copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be

distributed promptly by the board to: the police department, the department of codes administration, the health department, the fire department, and to the applicant.

2 Application forms shall be available at the office of the board

3 The application form shall include all the information indicated in subsection 6.54.040(5)(a) through (l).

4. The following persons must obtain a license: any partner of a partnership who will participate in the day to day operation of the business, any officer or director of a corporate applicant, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will participate in the day to day operation of the business.

5. The applicant shall furnish the following information under oath:

(a) Name and address, including all aliases (business address is sufficient);

(b) Proof that the individual is at least eighteen (18) years of age;

(c) All residential addresses of the applicant for the past three (3) years (for the purpose of facilitating the police investigation into the applicants criminal background);

(d) The business, occupation or employment of the applicant for five (5) years immediately preceding the date of the application (for the purpose of facilitating the police investigation into the applicants criminal background);

(e) Whether the applicant previously operated in this or any other county, city or state under an adult entertainment establishment license or similar business license. Whether the applicant has ever had such a license revoked or suspended, the reason therefore, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation;

(f) All violations, convictions, or any or pleas of *nolo contendere* to any crime of rape, aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crimes of a sexual nature, or any crime involving moral turpitude.

(g) All citations issued and sustained by a court within the past two years for violations of any provisions of the metropolitan zoning code applicable to adult entertainment establishments, including but not limited to sections 17.12.080(29), 17.60.020, 17.64.270.

(h) Fingerprints and two (2) portrait photographs at least two (2) inches by two (2) inches of the applicant. (for the purpose of facilitating the police investigation into the applicants criminal background)

(i) The address of the adult entertainment establishment to be operated by the applicant.

(j) If the applicant is a corporation the application shall specify the name of the corporation the date and state of incorporation the name and address of the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day to day operation of the business.

(k) If the applicant is a partnership, joint venture, or any other type of business the application shall specify the name and address of all persons who will be involved in the day to day operation of the business

(l) A statement by the applicant that he/she is familiar with the provisions of this ordinance and is in compliance with them.

6 If the applicant intends to have booth, stalls, cubicles, or rooms on the premises for the purpose of viewing sexually oriented movies, sexually oriented films, or adult videos, or sexually oriented live exhibitions, then along with the application, the applicant shall provide the board with his/her application a diagram, drawn to scale, of the premises including but not limited to the location and layout of all booths, stalls, cubicles, or rooms and the location of the clerk/managers stand or counter. Though the diagram shall be drawn to scale, it does not have to be professionally prepared

B. Inspections.

1. The police department, codes department, fire department, and health department shall, upon receipt of a copy of the application, inspect the premises to insure that the establishment complies with the metropolitan code including the applicable zoning ordinances, fire code statutes, ordinances and regulations, and the health code statutes, ordinances and regulations.

2. If a diagram is required to be submitted under 6.54.040(A)(6), then the code inspector shall confirm the layout of the booths, stalls, cubicles, or rooms complies with the submitted diagram and the requirements set out in 6.54.050(A)

3. The police department, codes department, fire department, and health department shall complete their respective inspections and shall communicate the results of their respective inspections to the board in writing within thirty (30) days of receipt of the application. The writing shall end with one of the following statements:

*The location at* ______________________________ *complies with the relevant and applicable code sections and applicable rules and regulations of the board.*

*The location at* ______________________________ *does not comply with the relevant and applicable code sections or does not comply with the relevant and applicable rules and regulations of the board. It is in violation of the following provisions* *Section numbers of code violations*

4. All ongoing businesses shall be inspected in accordance with 6.54.040(B)(1) and (2) regardless of whether the business already has a valid use and occupancy permit.

5. If the building/structure has a valid use and occupancy permit, the applicant shall provide the board with a copy of the valid use and occupancy permit which shall be made part of the file.

C. Board Action on Inspection Results.

1. Within twenty (20) days of receiving the results of the investigation conducted by the police

department, codes department, fire department, and health department the board will meet and determine if the applicant is in compliance with the applicable statutes, ordinances, and regulations. If the board determines that the applicant is in compliance with the applicable statutes, ordinances, and regulations, including but not limited to the zoning code, and the applicant has not committed any of the crimes listed in 6.54.040(A)(5)(f), is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the license.

2. Any applicant convicted of or who pleaded *nolo contendere* to any crime of rape, aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction shall be ineligible to receive a permit for the time period described below. Such denial and the reason for the denial shall be mailed to the applicant within ten (10) days of receiving the results of the investigation. The applicant may re-apply to the board once the time period has expired

(a) If the conviction or plea was for a misdemeanor violation then the applicant shall be ineligible to receive a permit for two (2) years from the date of the conviction plea, or release from confinement imposed for the conviction whichever is later.

(b) If the conviction or plea was for a felony violation then the applicant shall be ineligible to receive a permit for five (5) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(c) The time is computed from the date of the application to the date of the conviction, plea, or release from confinement based on the conviction.

3. If it is determined by the board, using the application and the investigation information, that the applicant has violated the provisions of the zoning code applicable to adult entertainment within the past two years, then the applicant is ineligible for a license for one (1) year from the date the citation was sustained. A violation of the zoning code shall be evidenced by a citation which has been sustained by any court in the metropolitan area.

4. If a diagram is required under 6.54.040(A)(6) and based on the code investigation, the board determines that the actual structure does not comply with 6 54 050(A) or the submitted diagram, then the applicant is not in compliance with this code section and the license shall be denied until the applicant is in compliance.

5 If in the course of the investigation it is discovered any false or misleading statement or information was given on the application, or material facts were omitted from the application, the board shall deny the application.

(a) The applicant shall be ineligible to receive a permit for one (1) year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or any of the crimes listed in 6.54.040(A)(5)(f).

(b) If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license until all persons who will participate in the day to day operation of the business are eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

(c) If the misleading statements or omissions referred to any of the crimes listed in 6 54.040(A)(5)(f), then the applicant shall not be eligible to receive a permit until the time period described in 6 54.040(C)(2)(a) through (c) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer

6. Within twenty (20) days of receiving the results of the investigation conducted by the police department, codes department, fire department, and health department, if the board shall determine that the applicant is not in compliance with the applicable statutes, ordinances, and regulations, the applicant shall be notified in writing that the license is denied for failing to comply with applicable statutes, ordinances, and regulations This notice shall specify the violation If the applicant can come into compliance as described m subsections 6.54.040(D) the denial shall not take effect The notice shall also specify that the applicant may request a hearing within ten (10) days as described in 6.54.040(E), cure the violation within fifteen (15) days and request re-inspection or request an extension of time as described in 6.54.040(D.).

7 The board has the discretion to hold any and all applications for further investigation if: (a) the initial investigation indicates a need for additional information, or (b) the initial investigation requires investigation into out of state records; or (c) verification of out of state employment is needed. Such additional investigation shall not exceed an additional

thirty (30) days, from the end of the initial twenty (20) days specified in 6.54.040(C)(6), unless otherwise agreed to by the applicant. Upon conclusion of such additional investigation, the board shall advise the applicant in writing whether the application is granted or denied in accordance with this section.

8. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing of the reasons for such action.

9. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at any reasonable time and place for examination under oath regarding said application or his or her refusal to submit to or cooperate with any investigation required by this ordinance, shall constitute an admission by the applicant that he/she is ineligible for such license and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection 6.54.040(C)(7).

10. No license shall be issued unless the police department has investigated the applicants criminal history by entering the information included on the application into the appropriate computer database or otherwise obtaining the information. The results of that investigation shall be filed in writing (this may be the print-out given by the computer database) with the board no later than thirty (30) days after the date application was received by the police department. This thirty (30) day period is the same thirty (30) days described in 6.54.040(B)(3).

D. Extensions of Time for the Applicant

1. If the license is denied under subsection 6.54.040(C)(6), the applicant may re-institute his/her

application by notifying the board in writing that he/she has come into compliance and requests re-inspection

(a) The applicant has fifteen (15) days from the mailing of the notice, given in 6 54.040(C)(6) to cure the violation and notify the board. If the violations have been corrected within the fifteen (15) day period, the owner has the responsibility to contact the board.

(b) The board has five days to notify the appropriate inspector that the applicant believes he/she has come into compliance

(c) Upon notification by the board the appropriate inspector shall return to the location for re-inspection and shall submit another written report as indicated in subsection 6.54.040(B)(3). The inspector has ten (10) days from the date he/she was notified by the board to re-inspect the premises and inform the board as to whether the applicant has come into compliance.

(d) Based on the report of the inspector(s), the board shall determine if the applicant has come into compliance and if so the board shall issue the license at the next regular meeting.

(e) If the owner fails to either contact the appropriate inspector to report that the code violations have been corrected or if the code violations have not been corrected then the application is denied in accordance with 6 54.040(C)(6)

2. If the process of curing the violation requires more time than that provided in 6 54.040(D)(1), the applicant may request an extension from the board If

the applicant does not make such a request in the time allotted the application is denied in accordance with 6.54 040(C)(6) and 6.54 040(D)(3).

(a) The request for an extension must be made in writing within fifteen (15) days from the mailing of the notice given in 6.54.040(C)(6).

(b) The board shall hear the applicants request for an extension at the next regular meeting.

(c) The hearing on the extension shall follow the same rules as set out in 6.54.020(G) except that the decision of the board shall grant or deny the extension and a decision to grant an extension shall take effect immediately.

(d) An extension shall only be granted when board decides that the applicant has demonstrated a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

3. If the applicant fails to follow the procedure set out in 6.54.040(D)(1) including the time limit or fails to get an extension within the time allowed and in accordance with 6.54.040(D)(2) then the application is denied and the applicant must reapply to obtain a license. Following the procedure set out in 6.54.040(D)(1) or 6.54.040(D)(2) requires no additional fees. Once the deadlines to cure the violation or ask for an extension of time have passed, the notice sent in 6.54.040(C)(6) shall be treated as a denial of the license.

E. Denial of the License Application

1. When an application is denied, the applicant has the right to request a hearing within ten (10) days of notification.

(a) The request shall be in writing and filed with the board within ten (10) days of notification of the denial.

(b) Once the request is received by the board, the board shall schedule a hearing at the next regular meeting of the board.

(c) At the hearing, the applicant may present evidence as to why his/her license should not be denied

(d) The board shall hear all relevant evidence regarding the license application and the denial and shall affirm or reject the denial of the application at the hearing and in writing stating the reasoning for the boards decision. Denial of the application can be immediately appealed by the applicant to the Chancery Court of Davidson County. The metropolitan department of law may initiate an action for a declaratory judgment

(e) The denial of the license shall be mailed by US mail within ten (10) days to the address of the applicant as listed on the application.

(f) Failure on the part of the applicant to request a hearing within the time limit provided is a waiver of the right to a hearing by the board. This waiver has no effect whatsoever on the applicants right to appeal any denial to the Chancery Court of Davidson County.

2. Any denial of an application for a license may be immediately appealed to the Chancery Court of Davidson County The metropolitan department of law may institute proceedings for a declaratory judgment

### 6.54.050 Standards for issuance of license.

A. Physical Layout of Adult Entertainment Establishment.

1. Any adult entertainment establishment having available for customers, patrons or members any booth, room or cubicle for the private viewing of any adult entertainment, including but not limited to sexually oriented films, sexually oriented movies, adult videos or sexually oriented live exhibitions, shall submit a diagram under 6.54.040(A)(6) and the diagram submitted must be substantially the same as the structure observed by the inspector. Further, the structure and the diagram shall comply with the following requirements:

2. Access. Each booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult entertainment establishment and shall be unobstructed by any door, gate, lock or other control-type devices.

3. Construction. Every booth, room or cubicle shall meet the following construction requirements.

(a) Each booth, room or cubicle shall be separated from adjacent booths, rooms and cubicles and any nonpublic areas by a solid or opaque wall;

(b) Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same,

(c) All walls shall be solid and without any openings, extended from the floor to a height of not less than six feet and be light colored, nonabsorbent, smooth textured and easily cleanable;

(d) The floor must be light colored, nonabsorbent, smooth textured and easily cleanable; and

(e) The lighting level of each booth, room or cubicle when not in use shall be a minimum of ten (10) foot candles at all limes as measured from the floor.

4. Occupants. Only one individual shall occupy a booth, room or cubicle at any time. No occupant of same shall engage in any type sexual activity, cause any bodily discharge or litter while in the booth. No individual shall damage or deface any portion of the booth.

5. The provisions enunciated in subsections 1 through 3 of this section shall not apply to bathrooms unless the bathroom contains any equipment which would allow the viewing of sexually oriented films, sexually oriented movies, adult videos or sexually oriented live exhibitions.

B. The applicant.

1. To receive a license to operate an adult entertainment establishment, an applicant must meet the following standards.

(a) If the applicant is an individual the applicant shall be at least eighteen (18) years of age

(b) If the applicant is a corporation all officers directors and stockholders required to be named under section 6.54.040(A)(5)(j) shall be at least eighteen (18) years of age;

(c) If the applicant is a partnership, joint venture, or any other type of organization where two or more persons have a financial interest all persons having a financial interest in the business and who have the ability to control or be involved in the day to day operation of the business shall be at least eighteen (18) years of age.

2 No individual applicant, no officer, director or stockholder required to be named under Section 6.54.040(A)(5)(j) and no partners required to be named under Section 6.54.040(A)(5)(k) who shall have been convicted of or have plead *nolo contendere* to any crime of rape. aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction shall be eligible to receive a permit for the time period described below.

(a) If the conviction or plea was for a misdemeanor violation then the applicant shall be ineligible to receive a permit for two (2) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(b) If the conviction or plea was for a felony violation then the applicant shall be ineligible to receive a permit for five (5) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(c) The time is computed from the date of the application to the date of the conviction, plea, or release from confinement based on the conviction.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application.

(a) If the applicant gave any false or misleading information or omitted any material facts, than the applicant shall be ineligible to receive a license for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or any of the crimes listed in 6.54.050(B)(2).

(b) If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

(c) If the misleading statements or omissions referred to any of the crimes listed in 6.54.050(B)(2) then the applicant shall not be eligible to receive a permit until the time period described in 6.54.050(B)(2)(a) through (c) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

(d) If the misleading statements or omissions referred to violations of the zoning code then the applicant shall not be eligible to receive a permit until the time period described in 6.54 050(B)(4) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

4. No applicant shall have been found to have previously violated chapter 6.54 or violated the metropolitan zoning code applicable to adult entertainment

establishments, including but not limited to sections 17 12.080(29), 17.60.020, 17 64.270 as evidenced by citations issued and sustained by a court within one (1) year immediately preceding the date of the application. If such violations exist the applicant shall be ineligible for a license for one (1) year from the date the citation was sustained

### 6.54.060 Permit Required.

In addition to the license requirements previously set forth for owners and operators of adult entertainment establishments no person shall be an entertainer in an adult entertainment establishment without first obtaining a valid permit issued by the board

### 6.54.070 Application for permit.

A. Application.

1. Any person desiring to secure a permit shall make application to the board. The original application with four copies shall be filed with and dated by the board. A copy of the application shall be distributed promptly by the board to the metropolitan nashville police department, and to the applicant.

2. The application for a permit shall be upon a form provided by the board. An applicant for a permit shall furnish the following information under oath:

(a) Name and address including all aliases,

(b) Written proof that the individual is at least eighteen (18) years of age,

(c) All residential addresses of the applicant for the past three (3) years (for the purpose of facilitating the police investigation into the applicants criminal background);

(d) The applicants height, weight, color of eyes, and hair(for the purpose of facilitating the police investigation into the applicants criminal background);

(e) The business, occupation, or employment of the applicant for five (5) years immediately preceding the date of the application (for the purpose of facilitating the police investigation into the applicants criminal background);

(f) Whether the applicant while previously operating in this or any other city or state under an adult entertainment establishment permit or similar business for whom applicant was employed or associated at the time has ever had such a permit revoked or suspended the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation;

(g) Whether the applicant has ever been convicted of or pleaded *nolo contendere* to any and all crimes of rape, aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction;

(h) Fingerprints and two (2) portrait photographs at least two (2) inches by two (2) inches of the applicant (for the purpose of facilitating the police investigation into the applicants criminal background); and

(i) A statement by the applicant that he/she is familiar with the provisions of this ordinance and is in compliance with them.

B. Standards for Issuance of Permit.

1 To receive a permit as an entertainer, an applicant must meet the following standards:

(a) The applicant shall be at least eighteen (18) years of age;

(b) An applicant who has been convicted of or who pleaded *nolo contendere* to any crime of rape, aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction shall be ineligible to receive a permit for the time period described below.

(i) If the conviction or plea was for a misdemeanor violation then the applicant shall be ineligible to receive a permit for two (2) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(ii) If the conviction or plea was for a felony violation then the applicant shall be ineligible to receive a permit for five (5) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(iii) The time is computed from the date of the application to the date of the conviction, plea, or release from confinement based on the conviction.

(c) The applicant shall not have given any false or misleading information on the application, omitted any material facts from the application.

(i) If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a permit for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or any of the crimes listed in 6 54.070(A)(2)(g)

(ii) If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer

(iii) If the misleading statements or omissions referred to any of the crimes listed on 6.54.070(A)(2)(g) then the applicant shall not be eligible to receive a permit until the time period described in 6.54.070(B)(1)(b)(i) through (iii) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

(d) The applicant shall not have been found to violate any provision of chapter 6.54 within one (1) year immediately preceding the date of the application

C Investigation.

The police department shall investigate the criminal history of the applicant and submit this history in writing (this may be the print-out generated by a computer database) to the board within thirty (30) days of receipt of the application by the police department.

D Board Action Based on the Investigation.

1. The board shall convene to review the application and the police investigation report within fifteen (15) days of receiving the results of the investigation conducted by the police department. If the board determines, based on the application and the report of the police department that the applicant has not committed any of the crimes listed in 6.54 070(A)(2)(g), is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application the board shall grant the permit to the applicant at that meeting. Information regarding prior residence shall never be the basis for the denial of a permit.

2. Any applicant convicted of or who pleaded *nolo contendere* to any crime of rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction shall be ineligible to receive a permit for the time period described below. Such denial and the reason for the denial shall be mailed to the applicant with in ten (10) days of the meeting described above in 6.54.070(D)(1). The applicant may re-apply to the

board once the time period described below has expired.

(a) If the conviction or plea was for a misdemeanor violation then the applicant shall be ineligible to receive a permit for two (2) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(b) If the conviction or plea was for a felony violation then the applicant shall be ineligible to receive a permit for five (5) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(c) The time is computed from the date of the application to the date of the conviction, plea, or release from confinement based on the conviction.

3. If in the course of the investigation it is discovered any false or misleading statements or information was given on the application, or material facts were omitted from the application, the board shall deny the application.

(a) The applicant shall be ineligible to receive a permit for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or any of the crimes listed in 6.54.070(A)(2)(g).

(b) If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

(c) If the misleading statements or omissions referred to any of the crimes listed in 6.54.070(A)(2)(g) then the applicant shall not be eligible to receive a permit until the time period described in 6.54.070(D)(2)(a) through (c) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

4. The board may hold any and all applications for further investigation if (a) the initial investigation indicates a need for additional information; or (b) the initial investigation requires investigation into out-of-state records, or (c) verification of out of state employment is needed Such additional investigation shall not exceed an additional thirty (30) days unless otherwise agreed to by the applicant. Upon conclusion of such additional investigation, the board shall advise the applicant in writing whether the application is granted or denied in accordance with this section.

5. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing of the reasons for such action.

6 When an application is denied, the applicant has the right to requests a hearing within ten (10) days of receipt of notification of the denial.

(a) The request shall be in writing and filed with the board within ten (10) days of receipt of notification of the denial.

(b) Once the request is received by the board, the hearing will be held at the next regular meeting of the board.

(c) At the hearing, the applicant may present evidence as to why his/her permit should not be denied.

(d) The board shall hear evidence on the issues and shall affirm or reject the denial of an application at the hearing and in writing stating the reasoning for the boards decision.

(e) The denial of the permit shall be mailed by US mail within ten (10) days to the address of the applicant as listed on the application.

(f) Failure on the part of the applicant to request a hearing within the time limit provided is a waiver of the right to a hearing by the board. This waiver has no effect whatsoever on the applicants right to appeal any denial to the Chancery Court of Davidson County.

7. Any denial of the application for a permit may be immediately appealed to the Chancery Court of Davidson County. The metropolitan department of law may also initiate proceedings for a declaratory judgment in the Chancery Court of Davidson County.

8. Failure or refusal of the applicant to give any information relevant to the investigation of the application or his or her refusal or failure to appear at any reasonable time and place for examination under oath regarding said application or his/her refusal to submit to or cooperate with any investigation required by this ordinance shall constitute an admission by the applicant that he/she is ineligible for such permit and shall be grounds for denial thereof by the board. This provision in no way requires the applicant to agree to any extensions beyond the extension described in 6.54.070(D)(4).

### 6.54.080 Fees.

A. A license fee of five hundred dollars ($500.00) shall be submitted with the application for a license. If the application is denied one-half (½) of the fee shall be returned.

B. A permit fee of one hundred dollars ($100.00) shall be submitted with the application for a permit. If the application is denied one-half (½) of the fee shall be returned.

### 6.54.090 Display of license or permit.

A. The license shall be displayed in a conspicuous public place in the adult entertainment establishment.

B The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours and shall be displayed upon request of any customer, any member of the police department, or any person designated by the board

C. If the business for which a license was issued ceases to exist in that a majority of the business assets have been liquidated, or the business has closed and ceased operations, then the license shall be turned into the board.

### 6.54.100 Renewal of license or permit.

A. Every license/permit issued pursuant to this ordinance will terminate at the expiration of one (1) year from the date of issuance unless sooner revoked and must be renewed before operation is allowed in the following year

B. Any operator desiring to renew a license or any entertainer desiring to renew a permit shall make application to the board The application for renewal must be filed not later than sixty days (60) days before the license/permit expires. The original application for renewal plus six copies shall be filed and dated by the board.

C. The board shall send a copy to the same departments who would receive a copy of the initial application. These departments shall process the application in the same manner and within the same time limits which apply to the initial application

D. The board shall provide the applicant with a copy of the application from the previous year and a new application form.

E The renewal form shall be the same form described in 6.54.040(A) for a license and 6.54.070(A) for a permit except as indicated below in subsection 6.54.100(H).

F. For a renewal the applicant may fill out the new form in its entirety or fill in any information which has changed over the year and is now different than the information indicated on the application from the prior year.

G. If the applicant chooses to only include information concerning items which have changed he/she will swear to the accuracy of both the information contained in the renewal form and the information attached from the prior year.

H. The renewal application form shall be the same form described in 6.54.040(A) for a license or 6.54.070(A) for a permit except the final line shall state:

> *I swear the information I have given in the application from 199_ is still accurate and any facts or*

*circumstances which have changed are indicated in this application for a renewal of the license/permit*

________________________________

*signature of applicant*

I. A license renewal fee of five hundred dollars ($500.00) shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of one hundred dollars ($100.00) shall be assessed against the applicant who files for a renewal less than sixty (60) days before the license expires. If the application is denied, one-half (½) of the fee collected shall be returned

J. A permit renewal fee of one hundred dollars ($100.00) shall be submitted with the application for renewal. In addition to said renewal fee, a late penalty of fifty dollars ($50.00) shall be assessed against the applicant who files for renewal less than sixty (60) days before the license expires. If the application is denied, one-half (½) of the fee shall be returned.

K The application for a renewal is subject to the same rules and limitations including the time limits described for the initial application including subsections 6 54.040, 6.54 050, 6.54.070, and 6.54.140 (causes for revoking a license/permit) Giving false or misleading information or omitting material information on a renewal application is grounds for denying the renewal of the license/permit.

L. Denial of an application to renew a license/permit can be appealed to the board

1. A hearing by the board shall be requested, by the applicant or the applicants agent, within ten days of the denial for the renewal.

2 The board shall hold the hearing at the next regular meeting where the applicant will be given an opportunity to testify and cross examine all witnesses.

3. The previous license/permit shall continue to be valid until the board has rendered a decision and the ten days required in subsection 6.54.020(G)(3) have passed.

M. The denial of any renewal for a license/permit may be appealed to the Chancery Court of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the Chancery Court for Davidson County.

### 6.54.110 Hours of operation.

A. All adult entertainment establishments shall be closed between the hours of 2:00 a.m. and 6:00 a.m. Monday through Saturday and between the hours of 3:00 a.m. and 12:00 noon on Sundays.

B. All public areas of every adult entertainment establishments shall be open to inspection at any time during normal business hours by the following departments: police, codes, fire, and health.

### 6.54.120 Responsibilities of the operator.

A. An operator is responsible for the conduct of all entertainers while on the licensed premises and any act or omission of any entertainer constituting a violation of the provisions of this ordinance shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended, or renewed subject to the limit described in subsection 6.54.140(11)

B There shall be posted and conspicuously displayed in the common areas of each adult entertainment establishment a list of any and all entertainment provided on the premises Such list shall further indicate the specific fee or charge in dollar amounts for each entertainment listed. Viewing sexually oriented motion pictures, sexually oriented films, sexually oriented movies, sexually oriented live entertainment or adult videos shall be considered entertainment.

C No employee of an adult entertainment establishment shall allow any minor to loiter around or to frequent an adult entertainment establishment or to allow any minor to view adult entertainment as deemed herein.

D. Every adult entertainment establishment shall be physically arranged in such a manner that the entire interior portion of the booths, cubicles, rooms or stalls, wherein adult entertainment is provided, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes, or any other obstruction whatsoever. Further any wall forming any portion of the booths, cubicles, rooms or stalls shall be solid and without any openings, extended from the floor to a height of not less than six feet. This section shall be construed in conjunction with 6.54 050(A)

E It shall be unlawful to install enclosed booths, cubicles, rooms or stalls for the purpose of secluded viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films or adult videos or sexually oriented live entertainment

F The operator shall be responsible for and shall provide that any booth, cubicle, room, stall or area used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or adult videos or sexually oriented live entertainment shall be readily accessible at all times and shall be continuously opened to view in its entirety.

G. No operator, entertainer of an adult entertainment establishment shall demand or collect all or any portion of a fee for entertainment before its completion. This provision does not apply to any fee charged at the door for admittance to the premises, or any fee charged for food or beverages.

H. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

> *This Adult Entertainment Establishment is regulated by The Metropolitan Code of Nashville and Davidson County* (Code Section #s). *Entertainers Are*
>
> *a Not permitted to engage in any type of sexual conduct;*
>
> *b Not permitted to demand or collect all or any portion of a fee for entertainment before its completion*

I. It shall be the duty of the operator, all entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, to ensure that the line of sight and view area between the main floor area and any stalls, booths, cubicles, or rooms remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is permitted access to any room, booth, stall, or cubicle.

J. It shall be the duty of the operator, all entertainers and employees on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, to ensure that the illumination described above is maintained at all times that any patron is present on the premises.

K No operator, entertainer or employee on the premises for furthering the business not including independent contractors on the premises for repairs or construction, shall allow openings of any kind to exist between viewing rooms, booths, stalls or cubicles, and no person shall make or attempt to make an opening of any kind between viewing rooms, booths, stalls or cubicles.

L. The operator or his/her agent shall, during each business day, regularly inspect the walls between the viewing rooms, booths, stalls or cubicles to determine if any openings or holes exist. If such openings exist it is the duty of the operator to repair the damage as soon as possible. No patron shall be permitted access to a viewing room, booth, stall or cubicle where an opening or a hole exists. It shall be the duty of the operator to ensure those rooms are unoccupied by patrons until the opening is repaired and covered.

### 6.54.130 Prohibitions and unlawful sexual acts.

A. No operator, entertainer, or employee of an adult entertainment establishment shall permit to be performed, offer to perform, perform, or allow customers employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia.

B No operator, entertainer, or employee shall encourage or permit any person upon the premises to touch caress or fondle the breasts, buttocks, anus, or genitals of any other person

C. No entertainer, employee, or customer shall be permitted to have any physical contact with any other entertainer, employee, or customer on the premises during any performance All performances shall only occur upon a stage at least eighteen inches (18) above the immediate floor level and removed at least six (6) feet from the nearest customer.

### 6.54.140 Revocation or suspension of license/permit.

A. The board shall revoke a license or permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application,

2. The operator or entertainer becomes ineligible to obtain a license or permit under 6.54.050(B) and 6.54.070(B).

3. Any cost or fee required to be paid by this ordinance is not paid;

4. An operator employs an entertainer who does not have a permit or provides space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. Any intoxicating liquor, cereal malt beverage, narcotic, or controlled substance is sold or allowed to be sold on the licensed premises;

6. Any operator employee or entertainer sells, furnishes, gives, displays, or causes to be sold, furnished, given, or displayed to any minor any adult entertainment or sexually oriented material,

7. Any operator, employee, or entertainer denies access to law enforcement personnel during business hours to any portion of the licensed premises wherein adult entertainment is permitted or to any portion of the licensed premises wherein adult material is displayed or sold;

8. Any operator allows continuing violations of the metropolitan code or the rules and regulations of the following departments: health, codes, fire, or zoning, or any violations of this chapter.

9. Any operator fails to maintain the licensed premises in a clean, sanitary and safe condition in accordance with the applicable statutes, ordinances, and regulations of the federal, state, and local governments.

10. The attempted transfer of a license/permit or any interest in a license/permit shall automatically and immediately revoke the license

B. In the case of a first offense by an operator where the conduct was solely that of an entertainer the penalty shall not exceed a suspension of thirty (30) days if the board shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge.

C Any and all other violations of this chapter shall be subject to either a fine or a suspension or both a fine and a suspension.

D The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer least ten (10) days written notice of the charges against him/her. In such cases the charges shall be specific and in writing except under 6.54.140(A)(10) above

2. The licensee/permittee shall have the opportunity for a hearing before the board at which time the operator or entertainer may present evidence bearing upon the question of suspension/revocation. The licensee/permittee has fifteen days from the receipt of the notice described above in 6.54.140(D)(1) to notify the board that he/she wishes to have a hearing.

3. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting.

4. If the licensee/permittee fails to request a hearing before the board within the fifteen days described in 6.54.140(D)(2) he/she will have waived the right to a hearing by the board. This has no effect, whatsoever, on the licensee's/permittee's right to appeal any revocation to the Chancery Court of Davidson County.

5 If the licensee/permittee requests a hearing the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held. Further if the

license/permit is suspended or revoked the suspension/revocation shall not go into effect until the minimum ten (10) day waiting period has passed as described in 6.54.020(G)(3).

E. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one (1) year from the date of revocation

### 6.54.150 Penalties and prosecutions.

A. Any individual, partnership, or corporation violating any of the provisions of this chapter shall be subject to any of the following penalties:

1. $500 00 for each offense; and/or

2. a suspension of any license/permit for a specified period of time for each offense; or

3. revocation of any license/permit for any conduct listed in subsection 6.54.140.

B. The penalty of suspension may not be combined with revocation A fine alone can be a penalty or it may be combined with a suspension.

C. Each violation of this ordinance shall be considered a separate offense and any continuing violation shall be considered a separate offense for each day of the violation

### 6.54.160 Remedies.

Any revocation or suspension of a license or a permit or any denial of a license or a permit or any denial to renew a license or a permit under the provisions of this chapter may be immediately appealed to the Chancery Court of Davidson County by the of Davidson County by the applicant. Any fine levied under the provisions of this section may be immediately appealed to the Chancery Court of Davidson County by the applicant. The metropolitan department of law may institute proceedings for a declaratory judgment in the Chancery Court of Davidson County.

### 6.54.180 Invalidity of part.

Should any court of competent jurisdiction declare any section, clause, or provision of this ordinance to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall effect only such section, clause, provision, or ordinance so declared unconstitutional, and shall not effect any other section, clause or provision of this ordinance.

*SECTION 2*: No application for a license or a permit shall be accepted or demanded until August 1, 1997.

*SECTION 3*: This ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

| | |
|---|---|
| APPROVED AS TO LEGALITY OF FORM AND COMPOSITION: | INTRODUCED BY: |
| /s/ Shayna Abrams | /s/ [Illegible] |
| Metropolitan Attorney | /s/ [Illegible] |
| /s/ [Illegible] | /s/ [Illegible] |
| /s/ [Illegible] | /s/ [Illegible] |
| /s/ [Illegible] | /s/ [Illegible] |
| /s/ [Illegible] | /s/ [Illegible] |
| /s/ [Illegible] | /s/ [Illegible] |
| /s/ [Illegible] | /s/ [Illegible] |
| /s/ [Illegible] | /s/ [Illegible] |
| /s/ [Illegible] | /s/ [Illegible] |
| /s/ [Illegible] | /s/ [Illegible] |

/s/ [Illegible] /s/ [Illegible]
/s/ [Illegible] /s/ [Illegible]
/s/ [Illegible] /s/ [Illegible]
/s/ [Illegible] /s/ [Illegible]
/s/ [Illegible] /s/ [Illegible]
/s/ [Illegible]

MEMBERS OF COUNCIL

APPROVED AS TO
AVAILABILITY OF FUNDS:

/s/ [Illegible]
/s/ [Illegible]

---

I, being under oath, do certify this is a true and exact copy of Ordinance No 097-796 of The Metropolitan Government of Nashville and Davidson County, Tennessee which passed third and final reading on August 19, 1997, at the meeting of the Metropolitan Council held on that date, and is now recorded in Book No. M59, Page 160.

Witness my hand and the Seal of The Metropolitan Government of Nashville and Davidson County, Tennessee, this 25th day of August, 1997.

/s/ [Illegible]
Metropolitan Clerk

STATE OF TENNESSEE )
COUNTY OF DAVIDSON )

Sworn to and subscribed before me, by Marilyn S. Swing, this 25th day of August, 1997.

/s/ [Illegible]
Notary Public

My Commission expires 09/27/97

---

DUPLICATE

---

METROPOLITAN COUNTY COUNCIL

**Bill No.** O97-796

**AN ORDINANCE AMENDING TITLE 6 OF THE METROPOLITAN CODE OF LAWS BY ADDING A NEW CHAPTER 6.54, LICENSING AND REGULATION OF ADULT ENTERTAINMENT AND ADULT BUSINESSES.**

(Filed May 27, 1997)

---

*Introduced* JUN 3 1997

*Passed first Reading* JUN 3 1997

*Referred to* BUDGET & FINANCE; CODES; PUBLIC SAFETY; HEALTH, HOSPITALS & SOCIAL SERVICES COMMITTEES

~~Amended~~ DEFERRED JUN 17 1997 AMENDED & DEFERRED INDEFINITELY JUL 15 1997

AMENDED & *Passed second Reading* AUG 7 1997

*Referred to* __________

*Passed third Reading* AUG 19 1997

---

*Approved* AUG 25 1997

*By* [Illegible]
Metropolitan Mayor

*Departments Notified* __________

*Advertised* ______________________________

---

Amendment No. 1
To
Bill No. O97-796

Mr. President:

I move to amend Bill No. O97-796 by adding a new sub-paragraph F to Section 6.54.070 to read as follows:

F. The permit carried by the entertainer shall contain only the following information: 1) A photo identification as provided by the applicant. 2) A computer generated number assigned to each applicant, corresponding to the file maintained on each applicant by the adult entertainment licensing board, and 3) The applicant's date of birth as indicated on the application.

INTRODUCED BY:

/s/ Chris Ferrell
Member of Council

ADOPTED: JULY 15, 1997

---

**AMENDMENT NO. 2**
**TO**
**BILL NO. O97-796**

**Mr. President:**

**I move to amend Bill No. O97-796 by deleting the words "August 1" wherein it appears in Section 2,**

**on page 25, and placing in lieu thereof the words "November 1."**

**INTRODUCED BY:**

/s/ **Chris Ferrell**
**Member of Council**

ADOPTED: JULY 15, 1997

---

## AMENDMENT NO. 3
## TO
## BILL NO. O97-796

**Mr. President:**

**I move to amend Bill No. O97-796 Section 2, by amending Section 6.54.010(A)(2) as follows:**

**1. Delete the definition of adult bookstore in Section 6.54.010(A)(2)(a) and substitute a new definition as follows:**

> (a) *Adult bookstore* means an establishment having a majority of its stock and trade or a majority of its floor space in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, adult videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

**2. Delete the definition of adult video store in Section 6.54.010(A)(2)(e) and substituting a new definition as follows:**

> (e) *Adult video score* means a commercial establishment having a majority of its stock or a majority of its floor space dedicated to "adult videos" – as defined below – which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "adult videos", or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation by patrons therein.

**INTRODUCED BY:**

/s/ **Chris Ferrell**
**Member of Council**

ADOPTED: JULY 15, 1997

---

**AMENDMENT NO. 4**
**TO**
**BILL NO. O97-796**

**Mr. President:**

**I move to amend Bill No. O97-796 by adding the words "on the premises for furthering the business but not including independent contractors on the premises for repairs and construction" after the word "employee" and before ", or customer shall be**

**permitted" wherein it appears in 6.54.130(C) Section 2.**

**INTRODUCED BY:**

/s/ **Chris Ferrell**
**Member of Council**

ADOPTED: JULY 15, 1997

---

AMENDMENT NO. 5

TO

ORDINANCE NO. 097-796

Mr. President:

I move to amend Ordinance No. 097-796 as follows:

(1) By amending Section 6.54.110 of the Ordinance by adding a new Subsection (C) as follows:

> "(C) That Subsection (A) shall have no application to any premises within the historically significant area as defined in Section 6.54.130(D)."

(2) By amending Section 6.54.130 of the Ordinance by adding a new Subsection (D) as follows:

> "(D) Subsection (C) shall have no application to any premises wherein the building is less that twenty (20) feet in width and the ceilings support joyces of the premises are no more than 7-1/2 (seven and one-half) feet from the floor and which premises are located in a historically significant area and the business on said premises has been in operation for at least five (5) years.

Historically Significant Area for this purpose shall be defined as follows: That area of downtown Metropolitan Nashville bound by Second Avenue North, Church Street, Fourth Avenue North, and Union Streets."

INTRODUCED BY:

/s/ [Illegible]
Member of Council

ADOPTED: JULY 15, 1997

---

AMENDMENT NO. 6

TO

BILL NO. O97-796

Mr. President:

I move to amend Bill No O97-796 by

1 Deleting 6 54.110(C) which states

Subsection (A) shall have no application to any premises within the historically significant area as defined in Section 6.54.130(D)

2 Deleting 6.54 130(D) which states

Subsection (C) above shall have no application to any premises wherein the building is less than twenty (20) feet in width and the ceilings support joists of the premises are no more that 7½ (seven and one-half) feet from the floor, and which premises are located in a historically significant area and the business on said premises has been in operation for at least five (5) years

> Historically significant Area for this purpose shall be defined as follows: That area of downtown Metropolitan Nashville bound by Second Avenue North, Church Street, Fourth Avenue North, and Union Streets

3 Amending Section 6 54 130(C) by deleting the word "six (6)" after "and removed at least" but before "feet from the nearest customer" and placing in lieu thereof the word "three (3)"

4 Amending Section 6 54 130(A) by adding the words "on the premises" after the words "of the genitalia"

5 Amending Sections 6 54.040(E)(2), 6 54 070(D)(7), 6 54 100(M), and 6 54 160 by adding the sentence "If the applicant or the permitee/licensee chooses to appeal by filing a writ of certiorari then The Metropolitan Government shall file the record of all proceedings to date (the date of the filing) with the court within ten (10) days from the date the Metropolitan Government was served" at the end of the paragraph

6. Amending Section 6 54.030(F) by deleting the words "at the time of the passage of this ordinance" after the words "All existing adult entertainment establishments" and before the words "must submit an application" By further amending Section 6 54 030(F) by adding subsection 1 and 2 as follows

> 1 All businesses which apply for a license within the one-hundred-twenty day period may continue to operate the adult business described in the application until the board has heard the application and voted to grant or deny the application as described in 6 54 040
>
> 2. Any appeal regarding the denial of the application shall be in accordance with 6.54.040(E)(2)

7. Amending Section 6.54.060 by lettering the existing paragraph as Section "A" and adding a Section "B" and a Section "C" as follows

> B All entertainers wishing to perform adult entertainment at an adult entertainment establishment shall have forty-five days from the date this ordnance becomes effective to obtain and submit an application for a permit All entertainers which apply for a permit within the forty-five day period may continue to operate at an adult entertainment establishment until the board has heard the application and voted to grant or deny the application
>
> C. If the application any appeal regarding the denial of the application shall be in accordance with 6.54 070(D)(6) and (7)"

8 Amending section 6.54.110 by deleting the time "2 00 am" and substituting in lieu thereof the time "3 00 am" after the words "between the hours of" and before "and 6 00 am" and by deleting the time "6 00 am" and substituting in lieu thereof the time "8 00 am" after the word "and" and before the words "Monday through Saturday"

INTRODUCED BY

/s/ [Illegible]
Member of Council

/s/ [Illegible]

ADOPTED: AUGUST 7, 1997

AMENDMENT NO. 7

TO

BILL NO. O97-796

Mr. President:

I move to amend Bill No. O97-796 by

1. Deleting the words "adult entertainment" and substituting in lieu thereof the words "sexually oriented" wherever the words appear in the ordinance except as specified below.

2. Deleting the words "adult entertainment establishment" and substituting in lieu thereof the words "sexually oriented business" throughout the entire ordinance.

3. Deleting the words "adult entertainment establishments" and substituting in lieu thereof the words "sexually oriented businesses" throughout the entire ordinance.

4. Deleting the word "adult" and substituting in lieu thereof the words "sexually oriented" wherever the word adult appears in the ordinance except; in Section 1(A) PURPOSE, the word "adults" after the words "or deny access by" and before the words "to sexually oriented materials protect" shall remain.

5. Deleting the word "an" and substituting in lieu thereof the word "a" before the words "sexually oriented business" wherever the word "an" precedes the words "sexually oriented business".

6. Amending the seventh whereas clause by deleting the word "entertainment" after the words "sexually oriented" and substituting in lieu thereof the word "business" and by changing the word "ordinance" to "ordinances" after the

words "sexually oriented business" and before "are unaffected by the following".

INTRODUCED BY:

/s/ [Illegible]
Member of Council

ADOPTED: AUGUST 7, 1997

## Chapter 6.54

## SEXUALLY ORIENTED BUSINESSES

**Sections:**

**6.54.010** **Definitions.**

**6.54.020** **Sexually oriented business licensing board.**

**6.54.030** **License required.**

**6.54.040** **Application for license.**

**6.54.050** **Standards for issuance of license.**

**6.54.060** **Permit required.**

**6.54.070** **Application for permit.**

**6.54.080** **Standards for issuance of a permit.**

**6.54.090** **Fees.**

**6.54.100** **Display of license or permit.**

**6.54.110** **Renewal of license or permit,**

**6.54.120** **Hours of operation.**

**6.54.130** **Responsibilities of the operator.**

**6.54.140** **Prohibitions and unlawful sexual acts.**

**6.54.150** **Revocation or suspension of license/permit.**

**6.54.160** **Penalties and prosecutions.**

**6.54.170** **Invalidity of part.**

### 6.54.010 Definitions.

For the purpose of this chapter, the words and phrases used in this chapter shall have the following meanings, unless otherwise clearly indicated by the context:

A. "Aggravated rape" means as defined in the Tennessee Code Annotated Section 39-15-502.

B. "Aggravated sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-504.

C. "Booth" means any booth, cubicle, stall, room or compartment which is designed, constructed or used to hold or seat patrons/customers and is designed such that the booth is separated from the common areas of the premises and is used for presenting sexually oriented entertainment including, but not limited to viewing sexually oriented moving pictures or viewing sexually oriented publications by any photographic, electronic, magnetic, digital or other means or medium (including, but not limited to, film, video or magnetic tape, laser disc, cd-rom, books, magazines or periodicals) for observation by patrons therein. "Booth" shall not mean a room or enclosure that is designed, constructed and regularly used to seat more than ten persons.

D. "Crimes of a sexual nature" means the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

E. "Current entertainer" means an entertainer performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

F. "Employee" means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of a sexually oriented business.

G. "Entertainer" means any person who provides live entertainment within a sexually oriented business as defined in this section, whether or not a fee is charged or accepted for entertainment and whether or not entertainment is provided as an employee or an independent contractor.

H. "Existing sexually oriented business," means a sexually oriented business that is operating within the metropolitan area as of March 1, 1999.

I. "Indecent exposure" means as defined in the Tennessee Code Annotated Section 39-13-511.

J. "Location" means a single site for which only one use and occupancy permit would be required.

K. "Metropolitan area" means the general services district of the metropolitan government of Nashville and Davidson County.

L. "Metropolitan council" means the legislative body of the metropolitan government of Nashville and Davidson County, Tennessee.

M. "New entertainer" means an entertainer not performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

N. "New sexually oriented business" means a sexually oriented business not in operation as of March 1, 1999.

O. Deleted.

P. "Operator" means any person, partnership, limited partnership, joint venture, corporation or any other type of business entity operating, conducting or maintaining a sexually oriented business.

Q. "Patronizing prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

R. "Promoting prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

S. "Prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

T "Public indecency" means as defined in the Tennessee Code Annotated Section 39-13-511.

U. "Rape" means as defined in the Tennessee Code Annotated Section 39-15-503.

V. "Rape of a child" means as defined in the Tennessee Code Annotated Section 39-15-522.

W. "Sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-505.

X. "Sexual exploitation of a minor" means as defined in the Tennessee Code Annotated Sections 39-17-1003, 39-17-1004 and 39-17-1005.

Y. "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions means a film, movie, motion picture videocassette, slides or other photographic reproduction that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities" or "specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Z. "Sexually oriented business/establishment" means any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

1. "Sexually oriented bookstore" means an establishment having a majority of its stock in trade or a majority of its floor space in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

2. "Sexually oriented nightclub" means a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which regularly features live performances that are characterized by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

3. "Sexually oriented theater" means an enclosed building in which films, motion pictures, videocassettes,

slides, or other photographic reproductions that are distinguished or characterized by an emphasis on depictions of "specified sexual activities" or "specified anatomical areas," as defined in this section, are regularly presented for observation by patrons therein.

4. "Sexually oriented video store" means a commercial establishment having a majority of its stock or a majority of its floor space dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

a. "Sexually oriented videos" means a video, CD, laser disk, or similar medium with a cover that depicts "specified sexual activities" or "specified anatomical areas" or a transparent or less than opaque cover through which "specified sexual activities" or "specified anatomical areas" can be viewed.

AA. "Sexually oriented entertainment" means the regular presentation, for a fee or incidentally to another service, of material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

BB. "Sexually oriented material" means "sexually oriented entertainment" and/or any material, including films, movies, motion pictures, videocassettes, slides, or other photographic reproductions, which regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities" or "specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

CC. "Specified anatomical areas" means:

1. Less than completely and opaquely covered;

a. Human genitals, pubic region,

b. Buttocks,

c. Female breasts below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely opaquely covered.

DD. "Specified sexual activities" means:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

EE. "Statutory rape" means as defined in the Tennessee Code Annotated Section 39-15-506. (Ord. BL99-61 §§ 1-5, 2000; Ord. 99-1814 §§ 1-5, 1999; Amdt. 1 § 1 with Ord. 99-1503 §§ 1-3, 1999; Ord. 97-1022 § 1, 1997;

amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 3 §§ 1 and 2 with Ord. 97-796 § 2 (part), 1997)

### 6.54.020 Sexually oriented business licensing board.

A. Establishment. A sexually oriented business licensing board is created and designated the metropolitan sexually oriented business licensing board (herein "board").

B. Membership – Terms.

1. The board shall consist of five members, who shall have been residents of the metropolitan area for not less than one year, and who shall continue to be eligible so long as they reside in the metropolitan area, to be appointed by the mayor and confirmed by a majority vote of the metropolitan council.

2. At least one of the five members shall be an attorney, and one of the five members shall be a health provider.

3. Of the five members first appointed, two shall be appointed for a term of two years, and two shall be appointed for a term of three years, and one shall be appointed for a term of four years. Thereafter, each member shall be appointed for a term of four years, and shall serve until his/her successor is appointed. Any vacancy other than the expiration of terms shall be filled for the unexpired term.

C. Election of Officers – Term. The board shall organize by the election of a chair and a vice-chair, who shall serve for a period of one year or until a successor shall have been chosen. The vice-chair is authorized to act in the place of the chair and in the same capacity as the chair when the chair is unavailable.

D. Meetings – Quorum Required – Minutes and Transcript.

1. The board shall hold two regular meetings each month at a time fixed by the board, and may hold such special meetings as may be necessary.

2. The attendance of at least a majority of the members of the board, not including unfilled positions, shall be required to constitute a quorum for the purpose of transacting business.

3. Minutes shall be kept of the meetings in permanent form and a record shall be kept of the action of the board with respect to every application for a license and/or a permit. The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits.

4. No transcript of the proceedings had before the board shall be in any form other than narrative, unless the board shall have been requested to provide for an exact copy of the testimony by an interested party at least twenty-four hours prior to a board meeting. The cost of an exact copy shall be borne by the person requesting the same.

E. Powers and Duties.

1. The board shall have jurisdiction over the licensing, regulating and controlling of all sexually oriented establishments as provided in this chapter, located in the metropolitan area.

2. The board may promulgate such bylaws, rules and regulations not inconsistent with state law, the Metropolitan Charter, or any ordinance, as it deems appropriate for the conducting of its business.

3. The board has the authority to subpoena witnesses to testify before the board.

F. Inspectors – Authority. The board is empowered to employ suitable person(s) as inspectors which inspectors shall not hold any civil service status. The board shall prescribe the duties of such inspectors so as to enforce the applicable provisions of this title.

G. Procedures for Hearings. This section shall apply to all hearings by the board including but not limited to hearings for revocation, suspension or denial of a license/permit.

1. Upon receiving a written request for a hearing, the board shall send the party requesting the hearing a notice stating the time and place of the hearing and the right to be represented by counsel.

2. At the hearing, the party requesting the hearing shall appear on his/her own behalf or be represented by counsel. All witnesses shall be sworn. The chair shall allow the party requesting the hearing to present witnesses on his/her own behalf and to cross-examine all witnesses testifying against him/her.

3. All decisions of the board shall be in writing, setting forth the findings of the board, and shall be signed by the chair or vice-chair.

4. Minutes shall be kept of all proceedings before the board in permanent form and a record shall be kept of the actions of the board with respect to all hearings.

5. A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. The record must be maintained by the board for a period of ninety days. Such record or any part thereof shall be transcribed at the request of any party at such party's expense.

6. The board will arrange for a court reporter to be present at any hearing after an initial adverse administrative decision. (Amdt. 1 with Ord. 99-1814 § 6, 1999; Amdt. 1 § 14 with Ord. 99-1503, 1999; Ord. 97-1022 § 3, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

### 6.54.030 License required.

A. Except as provided in subsection F of this section, from and after March 1, 1999, no sexually oriented business shall be operated or maintained within the metropolitan area without first obtaining a license to operate issued by the board.

B. Any person, partnership, limited partnership, joint venture, corporation or any other type of business entity which desires to operate more than one sexually oriented business/establishment must have a license for each sexually oriented business/establishment.

C. Only one license may be issued for each sexually oriented business location.

D. No license or interest in a license may be transferred to any person, partnership or corporation.

E. It is unlawful for any entertainer or operator to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business. It is unlawful for any employee to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business while sexually oriented entertainment is being presented.

F. All existing sexually oriented businesses, as defined in Section 6.54.010, must submit an application for a license by March 15, 1999, or cease operations. All existing sexually oriented businesses which apply for a license by March 15, 1999, may continue to operate the sexually oriented business described in the application even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.040(E)(3). All new sexually oriented businesses, as defined in Section 6.54.010, may submit an application at any time but may not operate until a license is granted except as permitted in Section 6.54.040(E)(4).

G. Any applicant found to have previously violated this chapter by operating or maintaining a sexually oriented business/establishment within the metropolitan area without a license, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 7, 8, 1999; Ord. 99-1503 §§ 4, 5, 1999; Ord. 97-1022 § 5, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

### 6.54.040 Application for license.

A. Application.

1. Any person, partnership, limited partnership, joint venture, corporation or any other type of business entity desiring to secure a license shall make application to the board. The applicant shall file the original application with six copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to: the police department, the department of codes administration, the health department, and the applicant.

2. Application forms shall be available at the office of the board.

3. The application form shall include all the information indicated in subdivisions (5)(a) through (5)(I) of this subsection.

4. The following persons must be listed in the license application for any sexually oriented business that is a corporate entity of any kind: the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation and management of the business. The following persons must be listed in the license application for any sexually oriented business that is a partnership, limited partnership, joint venture, or any other type of business: the name and address of all persons who will be involved in the day-to-day operation and management of the business.

5. The applicant shall furnish the following information under oath:

a. Name and address of the applicant, including all aliases (business address is sufficient);

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. Whether the applicant previously operated in this or any other county, city or state under a sexually oriented business/adult entertainment license/permit. Whether the applicant has ever had such a license/permit revoked or suspended, within the last year from the date of application, the reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation;

e. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

f. All judgements by a court within one year for violations of the metropolitan zoning Section 17.64.260;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

h. The address of the sexually oriented business to be operated by the applicant;

i. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation of the business;

j. If the applicant is a partnership, joint venture, or any other type of business, the application shall specify the name and address of all persons who will be involved in the day-to-day operation of the business;

k. A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate.

6. The applicant shall provide the board with his/her application, a diagram, drawn to scale of the premises, including the location and layout of all booths and stages and the location of the clerk/manager's stand or counter. Though the diagram shall be drawn to scale, it does not have to be professionally prepared.

7. If any of the information on the application changes over the course of the time for which the license is issued, including any changes in the physical layout of the premises, the licensee shall inform the board, in writing, of the changes.

B. Inspections and Investigations.

1. The codes department shall, upon receipt of a copy of the application, inspect the premises to insure that the establishment complies with the unique physical layout requirements set out in Section 6.54.050(A)(1), 6.54.050 (A)(3) and 6.54.130(C) of this chapter. The health department shall inspect the premises to insure compliance with applicable health code statutes, ordinances, and regulations. The police department shall investigate the applicant's criminal history collecting the applicant's fingerprints and 2 x 2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of both the inspections and the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any inspection or investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving the license and shall be treated by the board as if the report revealed no violations of applicable statutes, ordinances, or regulations, no violations of the provisions of this chapter, no sexually-oriented business/adult entertainment zoning code violations and/or no applicable criminal history.

2. The code department shall confirm that any booths or stages conform with the submitted diagram and the requirements set out in Sections 6.54.050A and 6.54.130.

3. The police department shall complete its investigation and the codes department and health department shall complete their respective inspections and shall

communicate the results to the board in writing within twenty days of receipt of the application. The written investigation from the codes department and health department shall end with substantially one of the following statements:

> The location at ___ complies with Chapter 6.54 and the applicable health code sections of the metropolitan code.
>
> The location at ___ does not comply with Chapter 6.54 and the applicable health code sections of the metropolitan code. It is in violation of the following provisions: Section numbers of code violations.

The writing from the police department shall end with substantially the following statement:

> The police department's criminal record check indicates that the persons listed on the application have/have not committed a crime of a sexual nature within the past five years. The persons listed on the application have committed the following crimes of a sexual nature:
>
> | Name | Crime | Date |
> |---|---|---|

4. If the building/structure has a valid use and occupancy permit, the applicant shall provide the board with a copy of the valid use and occupancy permit which shall be made part of the file.

C. Board Action on Inspection and Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department

and the inspections by the codes department, and health department the board will meet and determine if the applicant is in compliance with this chapter and the applicable health statutes, ordinances and regulations.

2. If the board determines that the applicant is in compliance with this chapter, the applicable health statutes, ordinances and regulations, and the applicant has not committed a crime of a sexual nature, as defined in Section 6.54.010, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application, then the board shall grant the license. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

3. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two days of the events described in this paragraph.

4. In the event the board denied the application in accordance with the provisions of this chapter, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation and inspections.

5. If it is determined by the board, using the application and the inspection reports that the applicant has violated the provisions of the zoning code applicable to sexually oriented/adult entertainment businesses within the past two years, then the applicant is ineligible for a

license for one year from the date the citation was sustained. A violation of the zoning code shall be evidenced by a judgement of a court. The fact that the judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgment is stayed.

6. Any investigation reports or inspection reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her license and shall be treated by the board as if that department approved the application.

7. If the board determines that the actual structure does not comply with Section 6.54.050(A) or the submitted diagram, then the applicant is not in compliance with this code section and the license shall be denied in accordance with Section 6.54.050(A) and (B).

8. If in the course of the investigation it is discovered any false or misleading statement or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.050(B)(3). False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

9. Within fifteen days of receiving the results of the investigation conducted by the police department, and inspection reports from the codes department, and health department, if the board shall determine that the applicant is not in compliance with this chapter, the zoning code or the applicable health statutes, ordinances and regulations, the applicant shall be notified in writing, the next business day, that the license is denied for failing to

comply with applicable statutes, ordinances and regulations. This notice shall specify the violation. If the applicant can come into compliance as described in subsection D of this section, the denial shall not take effect. The notice shall also specify that the applicant may request a hearing within five days, cure the violation within fifteen days and request reinspection or request an extension of time.

10. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days, from the end of the initial fifteen days specified subsection (C)(1) of this section, unless otherwise agreed to by the applicant.

11. Wherever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

12. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his/her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his/her refusal to submit to or cooperate with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such license and shall be grounds for denial

thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(10) of this section.

D. Extensions of Time for the Applicant.

1. If the license is denied, the applicant may reinstate his/her application by notifying the board in writing that he/she has come into compliance and requests reinspection.

a. The applicant has fifteen days from the mailing of the denial to cure the violation and notify the board or to request an extension pursuant to subsection (D)(2) of this section. The applicant has the responsibility to contact the board.

b. Once contacted, the board shall notify the appropriate inspector the next business day that the applicant believes he/she has come into compliance.

c. Upon notification by the board, the appropriate inspector shall return to the location for reinspection and shall submit another written report as indicated in subsection (B)(3) of this section. The inspector has five days from the date he/she was notified by the board to reinspect the premises and inform the board as to whether the applicant has come into compliance in the same manner described in subsection (B)(3) of this section and using the same language required in subsection (B)(3) of this section.

d. Based on the report of the inspector(s), the board shall determine if the applicant has come into compliance, and if so the board shall issue the license at the next regular meeting. The next meeting shall be held no later than fifteen days after the inspection report is filed with the board. Any inspections not filed with the board in the time period specified in this section will be treated as described in subsection (C)(6) of this section.

e. If the applicant fails to either contact the appropriate inspector to report that the code violations have been corrected, or if the code violations have not been corrected, then the application will be denied.

2. If the process of curing the violation requires more time than that provided in subsection (D)(1) of this section. the applicant may request an extension from the board. If the applicant does not make such a request in the time allotted, the application is denied.

a. The request for an extension must be made in writing within fifteen days from the denial.

b. The board shall hear the applicant's request for an extension at the next regular meeting. The next meeting shall be held no later than fifteen days after the request for the extension is received by the board.

c. The hearing on the extension shall follow the same rules as set out in Section 6.54.020(G) except that the decision of the board shall grant or deny the extension and a decision to grant an extension shall take effect immediately.

d. An extension shall only be granted when the codes inspector and the health inspector agree that an extension will not endanger the health or safety of the community and the board determines that the applicant has demonstrated a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

3. If the applicant fails to follow the procedure set out in this subsection then the application is denied and the applicant must reapply to obtain a license. Following the procedure set out in subsections (D)(1) or (D)(2) of this section requires no additional fees. Once the deadlines to cure the violation or ask for an extension of time have passed, the initial denial shall be treated as a denial of the application.

E. Denial of the License Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's notification.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

f. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two days of that specified time period.

2. Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For an existing sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(A)(8). Adverse administrative decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(A)(8). (Ord. 99-1814 §§ 9 – 32, 1999; Amdt. 1 §§ 2, 3 with Ord. 99-1503 §§ 6 – 30, 1999; Ord. 97-1022 §§ 6 – 39, 1997; amended during 9-97 supplement; Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

### 6.54.050 Standards for issuance of license.

A. Physical Layout of Sexually Oriented Business.

1. Any sexually oriented business having available for customers, patrons or members any booth, for the viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos, shall submit a diagram under Section 6.54.040(A)(6) and the diagram submitted must be substantially the same as the structure observed by the inspector. Further, the structure and the diagram shall comply with the following requirements:

a. Access. Each booth shall be totally accessible to and from aisles and public areas of the sexually oriented business and shall be unobstructed by any door, gate, lock or other control-type devices.

b. Construction. Every booth shall meet the following construction requirements:

i. Each booth shall be separated from adjacent booths and any nonpublic areas by a solid or opaque wall;

ii. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same;

iii. All walls shall be solid and without any openings, extended from the floor to a height of not less than six feet and be light colored, nonabsorbent, smooth textured and easily cleanable;

iv. The floor must be light colored, nonabsorbent, smooth textured and easily cleanable; and

v. The lighting level of each booth shall be a minimum of ten footcandles at all times as measured from the floor.

2. The provisions enunciated in subdivision 1 of this subsection shall not apply to bathrooms unless the bathroom contains any equipment which would allow the viewing of sexually oriented films, sexually oriented movies, sexually oriented videos.

3. Any live performance of sexually oriented entertainment shall occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer. A three-foot boundary from the outer edge of the stage shall be indicated on the floor by a rail, barrier, lighting, luminous tape or paint, or any other method which will make the boundary visible in a darkened condition so that the customer will not invade the three-foot boundary from the stage with any portion of his/her body.

B. Applicant.

1. To receive a license to operate a sexually oriented business, an applicant must meet the following standards:

a. If the applicant is an individual, the applicant shall be at least eighteen years of age;

b. If the applicant is a corporation, all officers, directors and stockholders required to be named under Section 6.54.040(A)(5)(i) shall be at least eighteen years of age;

c. If the applicant is a partnership, joint venture, or any other type of organization where two or more persons have a financial interest, all persons having a financial interest in the business and who are involved in the day-to-day operation of the business shall be at least eighteen years of age.

2. No individual applicant, no officer, director or stockholder required to be named under Section 6.54.040(A)(5)(i) and no partners required to be named under Section 6.54.040(A)(5)(j) convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a license for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the conviction by the trial court to the date of the application,. The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant until the trial court's conviction is reversed.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a license for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a license until the time period described in subsection (B)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

d. If the misleading statements or omissions referred to violations of Section 17.36.260 of the zoning code, then the applicant shall not be eligible to receive a permit until the time period described in subsection (B)(5) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. An applicant having had a sexually oriented business/establishment license or similar license/permit revoked within the last year shall not be eligible for a license for one year from the date of revocation.

5. No applicant shall have been found to have previously violated Section 17.36.260 of the metropolitan zoning code applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgement of a court within one year immediately preceding the date of the application. If such violations exist, the applicant shall be ineligible for a license for one year from the date the citation was sustained. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant until the trial court's judgement is reversed.

6. Any applicant found to have previously violated this chapter by operating or maintaining a sexually oriented business/establishment within the metropolitan area without a license, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on

the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 33 – 35 1999; Ord. 99-1503 §§ 31 – 49, 1999; Ord. 97-1022 §§ 40 – 45, 1997; amended during 9-97 supplement; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

### 6.54.060 Permit required.

A. Except as provided in subsection B of this section, from and after March 1, 1999, no person shall be an entertainer in a sexually oriented business within the metropolitan area without first obtaining a permit issued by the board.

B. All current entertainers, as defined in Section 6.54.010, wishing to continue to perform sexually oriented entertainment must submit an application for a permit by March 15, 1999. All current entertainers, who apply for a permit by March 15, 1999, may continue to perform sexually oriented entertainment even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.070(D)(3). All new entertainers, as defined in Section 6.54.010, may submit an application at any time but may not perform sexually oriented entertainment until a permit is granted except as described in Section 6.54.070(D)(4).

C. Any entertainer found to have previously violated this chapter by providing sexually oriented entertainment in a sexually oriented business, establishment within the metropolitan area without a permit, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a permit for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 36, 37, 1999; Ord. 99-1503 § 50, 1999; Ord. 97-1022 §§ 46, 47, 1997; Amdt. 7 (part) and Amdt. 6 § 7 with Ord. 97-796 § 2 (part), 1997)

### 6.54.070 Application for permit.

A. Application.

1. Any person desiring to secure a permit shall make application to the board. The applicant shall file the original application with three copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to the Metropolitan Nashville police department and the applicant.

2. Application forms shall be available at the office of the board. Applicants may obtain their application from the codes department. Applicants must also submit with each application two 2 x 2 photos.

a. Background Check. All background checks shall be completed by the metropolitan police department. The police department may be notified of a need for a background check in two ways. The applicant brings his/her application, including one of the two photos to the police department and has his/her fingerprints taken at the police department. The police then begin the background check and once completed, send the background check, application, fingerprint card, and photo to the office of the board. In the alternative, the applicant can obtain fingerprints as described below, turn into the board a complete application including, fingerprints and two photos and the board shall send the complete application to the police department requesting a background check. The police will return the complete application with the completed background check to the office of the board.

b. Fingerprints. The applicant shall have his/her fingerprints completed by the police department. If the applicant intends to mail his/her application to the board then he/she shall have his/her local law enforcement agency take his/her fingerprints and photograph and that law enforcement agency shall mail the fingerprints directly to the metropolitan police department.

c. Fees. If the applicant brings his/her application to the police department, the police department shall not charge the applicant any additional fee for fingerprinting or a background check. If the applicant has the fingerprinting performed without informing the police department that it is for his/her application for a sexually oriented entertainer permit, then the applicant may retain the receipts for the fingerprinting and give them to the codes department when the applicant files his/her application. The codes department shall subtract the expenses for the fingerprints from the one hundred dollar permit fee, and the applicant shall pay the difference. This same procedure applies if the applicant has his/her fingerprints and photographs taken by their local law enforcement agency and mailed directly to the metropolitan police department. Photos can be taken by the codes department at no additional fee or the applicant may have his/her photo taken elsewhere.

3. The application form shall include all information indicated in subdivisions (4)(a) through (4)(h) of this subsection.

4. The applicant shall furnish the following information under oath:

a. Name and address including all aliases;

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. The applicant's height, weight, color of eyes, and hair (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

e. Whether the applicant previously entertained in this or any other county, city, or state under a sexually oriented business license/permit or similar business license/permit within the last year. For whom the applicant was employed or associated at the time. Whether the applicant has had such a license/permit revoked or suspended within the last year and the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation;

f. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature); and

h. A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate.

B. Investigation. The police department shall investigate the applicant's criminal history by collecting the applicant's fingerprints and 2 x 2 photo and by performing a background investigation for crimes of a sexual nature. The results of the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if the report revealed no applicable criminal history.

C. Board Action on the Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and if it determines that the applicant has not been convicted of a crime of a sexual nature, as defined in Section 6.54.010, has not had a similar type of permit/license revoked in the last year, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit.

False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting then the permit shall be deemed approved and sent to the applicant by United States mail to the address listed on the application.

3. In the event the board denied the application in accordance with Section 6.54.080, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation.

4. Any investigation reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if that department approved the application.

5. If in the course of the investigation it is discovered any false or misleading statements or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.080. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

6. The board has the discretion to hold any application for further investigation if: (a) the initial investigation

requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or the revocation of a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in subsection (D)(1) of this section, unless otherwise agreed to by the applicant.

7. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

8. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his or her refusal to submit to or cooperate with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such permit and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(6) of this section.

D. Denial of the Permit Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's decision.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

f. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period, then the permit shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two days of that specified time period.

2. Any denial of the application for a permit may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may also initiate proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall

file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For any current entertainer, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8). Adverse decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new entertainer, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8).

E. The permit carried by the entertainer shall contain only the following information:

1. A photo identification as provided by the applicant;

2. A computer-generated number assigned to each applicant, corresponding to the file maintained on each applicant by the sexually oriented business licensing board; and

3. The date the permit was issued. (Ord. 99-1814 §§ 38 – 46, 1999; Amdt. 1 §§ 4 – 7 with Ord. 99-1503 §§ 51 – 64, 1999; Ord. 97-1022 §§ 48 – 62, 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 § 5 (part) and Amdt. 1 with Ord. 97-796 § 2 (part), 1997)

### 6.54.080 Standards for issuance of a permit.

A. Applicant. To receive a permit as an entertainer, an applicant must meet the following standards:

1. The applicant shall be at least eighteen years of age.

2. No applicant convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a permit for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the application to the date of the conviction.

3. The applicant shall not have given any false or misleading information on the application, or omitted any

material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a permit for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a permit until the time period described in subsection (A)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. The applicant shall not have had a sexually oriented business permit/license or similar business

permit revoked within the last year immediately preceding the application.

5. Any applicant found to have previously violated this chapter of the metropolitan code by providing sexually oriented entertainment within the metropolitan area without a permit, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a permit for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 47, 1999; Amdt. 1 § 8 with Ord. 99-1503 §§ 65 – 70, 1999; Ord. 97-1022 § 63 (part), 1997)

### 6.54.090 Fees.

A. A license fee of three hundred fifty dollars shall be submitted with the application for a license. If the application is denied, one-half of the fee shall be returned.

B. A permit fee of fifty dollars shall be submitted with the application for a permit. If the application is denied, one-half of the fee shall be returned. (Ord. BL99-61 § 6, 2000; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

### 6.54.100 Display of license or permit.

A. The license shall be displayed in a conspicuous public place in the sexually oriented business.

B. The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours and shall be displayed upon request of any member of the police department, health inspector, or board inspector.

C. If the business for which a license was issued ceases to exist in that a majority of the business assets have been liquidated, or the business has closed and ceased operations, then the license shall be returned to the board and cease to be valid. (Ord. 99-1503 §§ 67(2), 71, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

### 6.54.110 Renewal of license or permit.

A. Every license/permit issued pursuant to this chapter will terminate at the expiration of one year from the date of issuance unless sooner revoked and must be renewed before operation the following year.

B. Any operator desiring to renew a license or any entertainer desiring to renew a permit shall make application to the board. The application for renewal must be filed not later than sixty days before the license/permit expires. The original application for renewal plus the number of copies listed in Section 6.54.040A or 6.54.070A shall be filed and dated by the board.

C. The board shall send a copy to the same departments who would receive a copy of the initial application. These departments shall process the application in the same manner and within the same time limits which apply to the initial application.

D. The board shall provide the applicant with a copy of the application from the previous year and a new application form.

E. The renewal form shall be the same form described in Section 6.54.040A for a license and Section 6.54.070A for a permit except as indicated below in subsection H of this section.

F. For a renewal, the applicant may fill out the new form in its entirety or fill in any information which has changed over the year and is now different than the information indicated on the application from the prior year. The renewal must also include an updated background check by the police department and an updated 2 x 2 photo. The renewal does not require resubmission of fingerprints submitted with the initial application. However, if new or additional persons are involved in the day to day operation of the licensed business those persons must submit fingerprints as described above.

G. If the applicant chooses to only include information concerning items which have changed, he/she will swear to the accuracy of both the information contained in the renewal form and the information attached from the prior year.

H. The renewal application form shall be the same form described in Section 6.54.040A for a license or Section 6.54.070A for a permit except the final line shall state:

> I swear the information I have given in the application from 199___ is still accurate and any facts or circumstances which have changed are indicated in this application for a renewal of the license/permit.

____________________________
signature of applicant

I. A license renewal fee of five hundred dollars shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of one hundred dollars shall be assessed against the applicant who files for a renewal less than sixty days before the license expires. If the renewal is denied, one-half of the fee collected shall be returned.

J. A permit renewal fee of one hundred dollars shall be submitted with the application for renewal. In addition to such renewal fee, a late penalty of fifty dollars shall be assessed against the applicant who files for renewal less than sixty days before the permit expires. If the renewal is denied, one-half of the fee shall be returned.

K. The application for a renewal is subject to the same rules and limitations as the initial application.

L. When an application for a renewal is denied, the applicant has the right to request a hearing within five days of the board's decision.

1. The request shall be in writing and filed with the board within five days of the board's decision.

2. The board shall hear all the evidence pertaining to the denial of the renewal application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

3. At the hearing, the applicant may present evidence as to why his/her renewal application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any

denial to the circuit or chancery courts of Davidson County.

4. The board shall affirm or reject the denial of the renewal application at the hearing and in writing state the reasons for the board's decision.

5. The denial of the renewal application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

6. Any adverse administrative decision regarding the renewal of a license/permit that is appealed to any court shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. If a court fails to rule within forty days of the filing of an appeal, a new license/permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the renewal for a license/permit then that license/permit shall be revoked in accordance with Section 6.54.150(A)(8) and (C)(8). Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

M. The denial of any renewal for a license/permit may be appealed to the circuit or chancery courts of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the applicant or the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan governments shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with the petition for a writ of certiorari. (Amdt. 1 § 9 with Ord. 99-1503

§§ 72, 73, 1999; Ord. 97-1022 §§ 63 (part), 64 – 68, 1997; amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

### 6.54.120 Hours of operation.

A. All sexually oriented businesses shall be closed between the hours of three a.m. and eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays.

B. All public areas of every sexually oriented business shall be open to inspection at any time during normal business hours by the following departments: police, codes, board inspector, and health. (Ord. 99-1503 § 74, 1999; Ord. 97-1022 § 63 (part), 1997; Amdt. 7 (part) and Amdt. 6 § 8 with Ord. 97-796 § 2 (part), 1997)

### 6.54.130 Responsibilities of the operator.

A. An operator is responsible for the conduct of all entertainers while on the licensed premises and any act or omission of any entertainer constituting a violation of the provisions of this chapter shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended, renewed or a penalty assessed subject to the limits described in Section 6.54.150(E).

B. No employee on the premises for furthering the business, but not including independent contractors on the premises for repairs and construction, of a sexually oriented business shall allow any minor to loiter around or to frequent a sexually oriented business or to allow any minor to view sexually oriented entertainment as defined herein on the premises of a licensed business.

C. Every sexually oriented business shall be physically arranged in such a manner that the entire interior portion of any booths, wherein sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos are viewed, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes, or any other obstruction whatsoever. Further, any wall forming any portion of the booths, shall be solid and without any openings, extended from the floor to a height of not less than six feet. This section shall be construed in conjunction with Section 6.54.050A.

D. It is unlawful to install enclosed booths for the purpose of viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos. The licensee shall be responsible for and shall provide that any booth, or area used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos shall be readily accessible at all times and shall be continuously open to view in its entirety.

E. Live sexually oriented entertainment shall not be permitted in booths.

F. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

> This Sexually Oriented Business is regulated by The Metropolitan Code of Nashville and Davidson County, Chapter 6.54 which provides that no customer shall be permitted to have any physical contact with any entertainer on the premises during any performance. All performances shall only occur upon a stage at least eighteen inches above the immediate floor level at least three feet from the nearest customer.

G. It shall be the duty of the operator, to ensure that the line of sight and view area between the common area and any booths remain unobstructed by any doors, walls, merchandise, display racks or other materials at any time that any patron is permitted access to any booth. Entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall not place any obstructions in front of any booths at any time that any patron is permitted access to any booth.

H. It shall be the duty of the operator and employees on the premises for furthering the business, not including independent contractors on the premises for repairs or construction to ensure that the illumination in booths, described in Section 6.54.050(A)(1)(b)(v) is maintained at all times that any patron is present on the premises.

I. No operator shall allow openings of any kind to exist between booths, and no person, including entertainers and employees shall make or attempt to make an opening of any kind between any booths.

J. The operator or his/her designee shall, during each business day, regularly inspect the walls between the booths, to determine if any openings or holes exist. If such openings exist it is the duty of the operator to repair the damage as soon as possible. No patron shall be permitted access to a booth, where an opening or a hole exists. It shall be the duty of the operator to ensure those booths are unoccupied by patrons until the opening is repaired or covered. (Ord. 99-1814 § 48, 1999; Amdt. 1 § 10 with Ord. 99-1503 §§ 75 – 84, 1999; Ord. 97-1022 §§ 63 (part), 69 – 73, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

### 6.54.140 Prohibitions and unlawful sexual acts.

A. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, of a sexually oriented business shall permit to be performed, offer to perform, perform or allow customers, employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia on the premises.

B. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any entertainer, operator or employee.

C. No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

D. Only one individual shall occupy a booth at any time. No occupant of a booth shall engage in any type of copulation, masturbation or the display of specified anatomical areas as defined herein or cause any bodily discharge of urine, feces or semen while in the booth. No individual shall damage or deface any portion of the booth.

E. Live sexually oriented entertainment shall not be permitted in booths.

F. No customer shall invade the three-foot boundary from the outer edge of the stage as required to be designated by Section 6.54.050(A)(3). (Ord. 99-1814 §§ 49, 50, 1999; Ord. 99-1503 §§ 85 – 87, 1999; Ord. 97-1022 § 63 (part), 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 §§ 3, 4 and Amdt. 4 with Ord. 97-796 § 2 (part), 1997)

### 6.54.150 Revocation or suspension of license/permit.

A. The board shall revoke a license for any of the following reasons:

1. Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The licensee was or has become ineligible to obtain a license under Section 6.54.050(B);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The licensee knowingly employs, or with due diligence should have known that licensee was employing, an entertainer who does not have a permit. The licensee knowingly provides, or with the exercise of due diligence should have known the he/she was providing, space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. The licensee sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises. The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, the licensee's employee, who is on the premises furthering the business of the licensee, from selling, furnishing, giving, displaying, or causing to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, an entertainer to sell, furnish, give, display, or cause to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises;

6. The licensee knowingly denies, or thorough the exercise of due diligence should have known that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to

any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, his/her employee, who is on the premises furthering the business of the licensee, to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent an entertainer to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The attempted transfer of a license or any interest in a license;

8. If an application for a license or a renewal of a license was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits then that license shall be revoked on the effective date of the court's judgement.

9. The licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54.

A continuing violation shall mean more than two judgements from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the violation has been continuing until such time as the judgment of the board is reversed.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54 that the licensee did not know, or through the exercise of due diligence could not have known that his/her employees' acts or an entertainer's acts would violate Chapter 6.54. If the licensee knew or should have known that his/her employees' acts or an entertainer's acts were violating any subsection of Chapter 6.54, the licensee may still affirmatively prove as a defense to the violation that the licensee was powerless to prevent the continuing unsafe or unsanitary condition.

10. Continuous Violations of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. Continuous violations shall mean that the licensee had more than two judgements entered against him/her for violating Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four month period, not including periods of suspension. The fact that the trial court's judgement is being appealed shall have no effect on the revocation until such time as the judgement of the trial court is reversed.

B. The board shall either fine, suspend or fine and suspend a license for any of the following reasons, that are not sufficient grounds for revocation:

1. The licensee fails to maintain the licensed premises in a sanitary or safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 that he/she did not know, or through the exercise of due diligence could not have known of his/her employee's acts or omissions or an entertainer's act or omissions. If the licensee knew or should have known that his/her employee or an entertainer was violating any such subsection of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030, the licensee may still affirmatively prove as a defense to the alleged violation that he/she was powerless to prevent the unsafe or unsanitary condition.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the licensee shall either be fined five hundred dollars or his/her license shall be suspended for a period no less than five days and no longer than thirty days or the licensee shall be both fined five hundred dollars and his or her license suspended for a period of not less than five days and no longer than thirty days.

3. Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the license shall be suspended no less than thirty-one days and no longer than ninety days.

A second violation of Chapter 6.54, shall mean a prior judgement from the board, unless the decision of the board is appealed and overturned, that the licensee violated

Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the violation occurred previously until such time as the judgment of the board is reversed.

A second violation of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 shall mean a judgment from a trial court that the license violated Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. The fact that a trial court's judgment is being appealed shall have no affect on the suspension and the judgment shall be treated as a violation until such time as the judgment of the trial court is reversed.

C. The board shall revoke a permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The permittee has become ineligible to obtain a permit under Section 6.54.080A;

3. Any cost or fee required to be paid by this chapter is not paid;

4. The permittee provides sexually oriented entertainment on the premises of an operator who he/she knows, or with the exercise of due diligence should have known, does not have a license;

5. The permittee knowingly, or with the exercise of due diligence should have known that he/she, sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the premises;

6. The permittee knowing'y denies, or through the exercise of due diligence should have known that he/she was denying access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The permittee attempted to transfer his/her permit or any interest in his/her permit to someone else;

8. The application for a permit or the application for the renewal of a permit was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits;

9. The permittee repeatedly fails to comply with the provisions of Chapter 6.54. Repeatedly fails to comply shall mean that the permittee has been found by the board to have violated Chapter 6.54 more than twice within a period of twenty-four months, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the permittee has repeatedly failed to comply until such time as the judgment of the board is reversed.

D. The board shall suspend a permit for any of the following reasons that are not grounds for revocation:

1. The permittee violates Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permittee shall either be fined five hundred dollars or his or her permit shall be suspended for a period no less than five days and no longer than thirty days or the permittee shall be both fined five hundred dollars and his or her permit suspended for a period of no less than five days and no longer than thirty days.

Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permit shall be suspended no less than thirty-one days and no longer than ninety days.

E. The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer five days' written notice of the alleged violation(s) against him/her. In such cases the charges shall be specific and in writing except under Section 6.54.150(A)(7), (8) and Section 6.54.150(C)(7), (8) of this chapter.

2. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting.

The next meeting shall be held no later than fifteen days after the notice described above is mailed. The licensee/permittee may present evidence bearing upon the question of suspension/revocation.

3. If the licensee/permittee fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board on the citation. Failing to appear before the board will not preclude the licensee's/permittee's right to appeal any revocation/suspension to the chancery court of Davidson County.

4. If the licensee/permittee requests a hearing, the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held.

5. Any adverse administrative decision to suspend or revoke a license/permit that is appealed to the circuit or chancery courts of Davidson County shall not take effect until the administrative decision has been upheld by the court after adjudication on the merits. Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

6. The revocation/suspension of a license/permit may be appealed to the circuit or chancery courts of Davidson County by the licensee/permittee. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within seven days from the grant of the writ of certiorari.

F. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one year from the date of revocation. (Amdt. 1 §§ 11-13 with Ord. 99-1503 § 88, 1999)

### 6.54.160 Penalties and prosecutions.

A. Any individual, partnership or corporation violating any of the provisions of this chapter shall be subject to any of the following penalties:

1. Five hundred dollars for each offense; and/or

2. A suspension of any license/permit for a specified period of time for each offense listed in Section 6.54.150B or D; or

3. Revocation of any license/permit for any conduct listed in Section 6.54.150A or C.

B. The penalty of suspension may not be combined with revocation. A fine alone can be a penalty or it may be combined with a suspension.

C. Each violation of this chapter shall be considered a separate offense and any continuing violation shall be considered a separate offense for each day of the violation. (Ord. 99-1503 §§ 89, 90, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

### 6.54.170 Invalidity of part.

Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter. (Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

## CERTIFICATION

I, Marilyn S. Swing, being the duly appointed Metropolitan Clerk of The Metropolitan Government of Nashville and Davidson County, do hereby certify that the foregoing is a true and exact copy of **CHAPTER 6.54** of the Metropolitan Code of Laws as adopted by Ordinance No. BL2004-420.

WITNESS MY HAND and the Seal of the Metropolitan Government of Nashville and Davidson County, Tennessee, this 10th day of December, 2004.

/s/ Marilyn S. Swing
Metropolitan Clerk

STATE OF TENNESSEE )
COUNTY OF DAVIDSON )

Sworn to and subscribed before me, by Marilyn S. Swing this 10th day of December, 2004

/s/ Vicki L. Lang
Notary Public

My Commission expires: 03/26/05

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | |
|---|---|
| DEJA VU OF NASHVILLE, INC. a Tennessee Corporation; MICHAEL RUCKER, individually, MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation, THE PLEASURE PALACE, INC. a Tennessee corporation; CAROUSEL AMUSEMENT CENTER, INC., a Tennessee corporation; DAWN PIERCE and ELIZABETH MARTZ, individually,<br>Plaintiffs,<br>v.<br>METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMITT TURNER, Chief of Police of the Metro Police Department<br>Defendants. | CIVIL ACTION NO. 3-97-106<br>JUDGE NIXON |

---

## VERIFIED COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT

(Filed Oct. 17, 1997)

---

1. This is a civil action whereby Plaintiffs pray for a preliminary and permanent injunction enjoining the

Defendants from enforcement of Chapter 6.54 of the Code of Ordinances of the Metropolitan Government of Nashville and Davidson County, Tennessee (hereinafter "Chapter 6.54" or the "Ordinance"), passed on third reading by its Metropolitan County Council on August 19, 1997, on the ground that this Ordinance is unconstitutional on its face and as applied, and in its threatened application to Plaintiffs in their activities described below. Further, Plaintiffs pray for a declaratory judgment to determine the constitutionality of said Ordinance on its face, as applied to Plaintiffs, and in its threatened application to them, and Plaintiffs also request attorney fees as a result of the injuries sustained to their fundamental constitutional rights.

* * *

21. Plaintiffs aver that the licensing scheme as a whole is unconstitutional on its face, or as applied, because of the lack of procedural safeguards. It violates due process and is overbroad. It further violates equal protection. In addition, individual provisions of the Ordinance are unconstitutional or unconstitutional as applied to the Plaintiffs. The licensing scheme as a whole and the individual provisions thereof violate one or more of the following grounds:

* * *

(B) It is a prior restraint on speech in violation of the First Amendment and Article 1, Section 19 of the Tennessee Constitution.

(C) It is overbroad in violation of the First Amendment and Article 1, Section 19 of the Tennessee Constitution.

(D) It is overbroad and is a content-related statute and not a content-neutral time, place and manner regulation.

(E) If the Ordinance could be construed as a content-neutral time, place and manner regulation, it is overbroad in violation of the free speech provisions of the United States and Tennessee Constitutions because it applies to premises, places, and modes of communication which are not likely to produce the secondary or undesirable effects the Ordinance was intended to prevent. It improperly restricts expressive conduct protected by the First Amendment and Article 1, Section 19 of the Tennessee Constitution.

(F) It is unconstitutionally vague and indefinite in violation of the First, Fifth and Fourteenth Amendments and Article 1, Section 19, Article 1, Section 8 and Article 11, Section 8 of the Tennessee Constitution.

* * *

(H) It grants unbridled discretion to officials to deny, revoke and suspend licensing and permits and is not narrowly tailored as required for rights protected by the First Amendment.

* * *

(J) If the Ordinance could be construed as a content-neutral time, place and manner regulation, it does not further a substantial government interest, is not unrelated to the suppression of free speech and is not narrowly tailored.

* * *

(L) The Ordinance violates the First and Fourteenth Amendments and Article 1, Section 8, Article 11, Section 8 and Article 1, Section 19 of the Tennessee Constitution in that it is unconstitutionally vague in its definitions and in many of its undefined terms.

* * *

(O) The Ordinance and particularly the limitation of hours of operation are invalid in that they are not based upon a proper consideration of secondary effects. While the preamble and certain provisions of the Ordinance states evidence was presented to justify or identify secondary effects, there is no justification for closing hours adopted for Sundays as well as for hours generally nor to justify other restrictions in the Ordinance. . . .

* * *

(S) The Ordinance was passed pursuant to an illegal and impermissible motive in order to ban adult entertainment within Metro.

* * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

---

DEJA VU OF NASHVILLE, INC., et al,

Plaintiffs,

vs.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al,

Defendants.

CASE NO. 3:97-1066

---

## TRANSCRIPT OF PROCEEDINGS

---

BEFORE: THE HONORABLE ALETA A. TRAUGER

DATE: JANUARY 27, 1999

TIME: 2:00 P.M.

---

REPORTED BY: BEVERLY E. "BECKY" COLE, RPR CCR
OFFICIAL COURT REPORTER
A-837 U.S. COURTHOUSE
NASHVILLE, TN 37203
(615) 254-6727

[2] APPEARANCES

FOR THE PLAINTIFFS: BRADLEY J. SHAFER
ANDREW WILKINS
Shafer & Associates
Lansing, Michigan

MICHAEL F. PLEASANTS
Memphis, Tennessee

JOHN HERBISON
Nashville, Tennessee

FOR THE DEFENDANTS: FRANCIS YOUNG
JAMES CHARLES
SHAYNA ABRAMS
Metropolitan Government of Nashville
Nashville, Tennessee

HENRY SIRKIN
Sirkin, Pinales & Schwartz
Cincinnati, Ohio

* * *

[4] MR. PLEASANTS: If Your Honor please – if I may approach the podium – Mr. Shafer will deliver the principal portion of our argument, there is one preliminary matter that I must bring to Your Honor's attention.

And it has been an evolving matter as our investigation has attempted to proceed, and that is the issue of whether Your Honor should consider disqualifying yourself based upon what we now understand to be your former employment as chief of staff for the Metropolitan Government and assistant to the current mayor, Mayor Bredesen.

It is has also come to our attention, and not that – we have no privy knowledge of this, it's just simply said to be a matter of common knowledge among the Nashville Bar, that your husband, Mr. Byron Trauger, is also counsel, personal legal counsel, to the Honorable Mayor Bredesen; and that for these reasons, there is a possibility of an appearance of impropriety or as set out in the statute that governs this, Section 455 of Title 28, that it might provide a basis upon which impartiality might reasonably be questioned.

Further, what I believe to be a curiosity but I would respectfully ask Your Honor to enlighten us on this, in attempting to pursue an investigation, I consulted the [5] current edition of Martindale Hubbell in our office, the 1999 edition, and was – although I know Martindale Hubbell makes errors, in this case they have Your Honor listed – at this time the current Martindale Hubbell – as chief of staff to Metropolitan Government.

THE COURT: They do make mistakes, don't they?

MR. PLEASANTS: So I didn't know how somehow or another there could have endured a relationship, Your Honor, or Your Honor hasn't been reading your junk mail from Martindale Hubbell.

So we direct these matters to Your Honor's attention. If there is anything we need to know about, we respectfully request that Your Honor make any such disclosure as might be appropriate under the circumstances.

THE COURT: Oh, absolutely. I was chief of staff not to Metropolitan Government. I was chief of staff to the Mayor from September 1 of '91 until – actively until the end of April of '92, and then I went on leave for about three months, and then I resigned, with a small child.

So I was there seven months. I do have a friendship with the Mayor. He is a friend. My husband is his personal attorney. He does not do work for the Metro Legal Department. He is his personal attorney.

In the last five years, I do not believe I have ever recused myself in a matter involving Metro because the [6] Mayor's credibility or anything that – the Mayor's credibility was never an issue. Nothing that I ever worked on at Metro came before me. This was my five years as a bankruptcy judge.

In my two months as a district court judge, I am probing carefully with the lawyers in status conferences and in initial case management conferences whether there is anything in the case that happened when I was in the Mayor's office that I would have had any relationship to whatsoever and also whether anybody connected to Metro, primarily the Mayor, is going to be a witness or if in any way his credibility is an issue.

And just as an example, I had a case a couple of weeks ago, and they told me the Mayor was going to be a witness, but they ended up saying, well, it's not going to be disputed testimony; they have ended up stipulating to what the Mayor's testimony would be.

It's not any kind of a credibility issue at all. It was just some facts that needed to get in. And so even in that case, I'm not recusing myself.

Metro certainly is a litigant in federal court very often. I'm sensitive to my colleagues being – having being foreclosed on in all Metro cases, and so I have – I have never done it.

This ordinance I had absolutely no connection with.

[7] And in my hours and hours and hours, and I wish you folks had raised this a whole long time ago, but in all my preparation for today's hearing, I have not come across anything that has caused me to in any way think there

was – you know, that the Mayor – the Mayor was even invested in this ordinance in any way.

You all have sought, I think, to take discovery from councilmen in terms of their intent on passage of the ordinance, and so forth, but I saw nothing where you were attempting to get any kind of discovery from the Mayor.

As I say, I had no connection with this ordinance at all when I was at Metro some eight years ago, so I haven't really seen anything that has caused me to really question it.

But if you have – I mean, if you have anything else that you know that I haven't discussed, please tell me. I mean, is there any other –

MR. PLEASANTS: No, Your Honor.

THE COURT: Was there anything happening in this area in the time I was chief of staff that would have touched on this? I'm just am not aware of it.

MR. SHAFER: Your Honor, the only thing I'm aware of is that, you know, back in 1989 my office had a prior ordinance invalidated, and whether or not there was anything going on in the interim before this thing came up [8] in 1997, I don't know.

THE COURT: Yeah, that was under the previous Mayor.

I did – my antenna did go up when I saw that you had some interest at some point in the – how the people were selected for the board, and I know the mayor makes those selections.

And if you were going to question, you know, who was selected or why, or any of that, and that seems to have gone away, at least I don't see that as an issue you are pursuing –

MR. SHAFER: Well, Your Honor, actually – and I'm not trying to invoke this merely on this issue. But as I told you when we were here last time, you do have before you our motion for review in regard to Magistrate Griffin's ruling on the discovery. And, in fact, that is one of the issues that we are asking the court to review.

Now, I'm not going to tell you that it was ever my intent to specifically take a deposition of the Mayor. We would have, and did, request a 30(b)(6) deposition notice.

I assume the Mayor has people on his staff who are familiar with these facts. So I'm not – you know, merely for purposes of this motion, I'm not going to tell you it was ever my intent to depose the mayor. We just submitted a 39(b)(6) deposition notice on that issue.

[9] THE COURT: On why he picked the people that he picked?

MR. SHAFER: Yes, Your Honor, what their criteria was; you know, why – what was involved in the decision, you know, concerning this; what are their qualifications for making these decisions.

THE COURT: Okay.

MR. SHAFER: You know, were these people picked out of just whole clothe, are these really just political appointments, are they – and what is most important to us, are these people who are against these type of businesses.

You know, that is a discovery issue that, A, is currently before the court; and, B, may come back – may be revisited because there are certainly – discovery is certainly not done on this case, at least from our perspective.

And that, I believe, was acknowledged in one of Magistrate Griffin's more recent rulings about the fact that she was knocking off the discovery deadline because there might be discovery.

We were previously addressing merely discovery issues relating to this motion and the motion to lift the injunction; and, therefore, those discovery deadlines have been somewhat indefinitely extended.

And it's my understanding from the time the initial [10] board was constituted and then there was an injunction for approximately a year based on Judge Nixon's ruling that a lot of the board members have now changed.

I don't have the exact numbers, or anything, but my understanding is a lot of members have left, new members have been brought in, and at some point we're going to want to know why these people were picked.

* * *

[12] THE COURT: And so let's say that – let's say that these – tell me if the discovery on that issue, if it were the best for you that it could be, and I'm not sure what that would be, but let's say that you discovered who those people were and how they were appointed and – what would be your strongest argument with relation to that point?

MR. SHAFER: Both a procedural and a substantive due process argument.

THE COURT: Yeah.

MR. SHAFER: And I'll tell the court specifically, this is totally uncharted waters. And the [13] reason for that is very simple. The court has in front of it God knows how many adult zoning and licensing cases. All of those dealt with the government making the decision.

You know, you go down to the police department, you file your application. None of them that I'm aware of dealt with some type of quasi – governmental quasi, you know, public board of people from the community that are making these calls.

And so, yes, the argument would be procedural and substantive due process. If, in fact, the argument is that they are stacking the deck for people who are – for example, members of citizens for decency through law who go to classes to learn how to answer questions in jury voir dire to get on an obscenity case, yeah, we would have a problem with that. And we would claim that there is a clear intent now to impact upon our First Amendment rights.

THE COURT: Okay. Okay.

* * *

THE COURT: Okay. I see what your argument could be. I am intimately familiar with how this mayor makes appointments to boards. I have no familiarity with how he made the appointments to this board, although I do [14] know one of the people that was originally appointed to the board, who may or may not still be a member of the board.

I can see how that argument could arise at some point in this case. It's not here today, but I see that it could arise at some point in the case.

MR. SHAFER: And it would have been had we been able to get the discovery we wanted.

THE COURT: Yeah. This is not under the code of judicial ethics a mandatory recusal, as I see it. There are certain categories of mandatory recusal, and then there is another whole category of recusal based upon the appearance of things.

And in that category, there is a remittal procedure, and I don't know if you're familiar with that remittal proceedure?

MR. SHAFER: I'm not.

* * *

[15] THE COURT: It's a kind of a waiver. And what you do is you present the parties with the form, and then they go talk to their clients and disclose to their clients what the various issues are and then the parties can decide.

But given the nature of what you have told me today, I'm not going to give you the remittal form. I – I am not comfortable if you – if I have to make a decision whether or not you are allowed to get into the whole issue of the appointment process, if I have to make that decision, and it sounds like I will have to make that decision, I was very close to that process at one time with this mayor, so I'm not comfortable.

I'm not comfortable anymore, and so I am going to recuse myself.

* * *

# IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, INC., et al.,<br>Plaintiffs,<br>v.<br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,<br>Defendants. | ) | No. 3-97-1066<br>Judge Nixon<br>Magistrate Judge Griffin |
| | | Consolidated Cases |
| JERRY C. PENDERGRASS, et al.,<br>Plaintiffs,<br>v.<br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,<br>Defendants. | ) | No. 3-97-1176<br>Judge Nixon<br>Magistrate Judge Griffin |

---

## BRIEF IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

---

## TABLE OF CONTENTS

**TABLE OF AUTHORITIES** .......... vi

**PREAMBLE** .......... 1

I. INTRODUCTION/SUMMARY .................... 5

II. STANDING .................... 10

III. LEGAL STANDARDS FOR EVALUATING THE CONSTITUTIONALITY OF CHAPTER 6.54 .................... 10

  A. GENERAL FIRST AMENDMENT FREE SPEECH CONSTITUTIONAL STANDARDS TO BE APPLIED .......... 10

  B. CONSTITUTIONAL STANDARD OF VAGUENESS .................... 19

  C. CONSTITUTIONAL STANDARD FOR OVERBREADTH .................... 22

  D. CONSTITUTIONAL STANDARD OF EQUAL PROTECTION .................... 23

  E. CONSTITUTIONAL STANDARD OF BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS .................... 25

  F. CONSTITUTIONAL STANDARD OF "PRIOR RESTRAINT" UPON SPEECH... 26

  G. THE DOCTRINE OF COLLATERAL ESTOPPEL PREVENTS THE DEFENDANTS FROM RE-LITIGATING PARTS OF THE ORDINANCE THAT HAVE ALREADY BEEN FOUND TO BE UNCONSTITUTIONAL .................... 27

IV. THE DEFENDANTS' CONDUCT OF ENGAGING IN OBSTRUCTIONIST TACTICS IN REGARD TO REQUESTED DISCOVERY WARRANTS THIS COURT GRANTING PLAINTIFFS' MOTION ........ 28

V. PROVISIONS OF THE LICENSING AND PERMITTING PROCEDURES AS SET FORTH WITHIN CHAPTER 6.54 WHICH RENDER THE ORDINANCE TO BE UNCONSTITUTIONAL .......... 38

A. THE CRIMINAL DISABILITIES PROVISIONS .......... 38

1. THE UNCONSTITUTIONALITY OF USING PRIOR CRIMES TO PRECLUDE EXERCISE OF FIRST AMENDMENT RIGHTS .......... 38

2. THE CRIMES OF "MORAL TURPITUDE" .......... 47

3. THE LACK OF A MENS REA ELEMENT AND THE INABILITY TO REFUTE THE CONVICTION .......... 56

B. THE COMPELLED DISCLOSURE OF PERSONAL INFORMATION REQUIRED BY BOTH SECTION 6.54.040(A)(5) (APPLICATION REQUIREMENTS FOR ADULT ENTERTAINMENT ESTABLISHMENT LICENSES) AND SECTION 6.54.070(A)(3) (APPLICATION REQUIREMENT FOR ADULT ENTERTAINMENT ESTABLISHMENT ENTERTAINER PERMITS) VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE RIGHT TO PRIVACY .......... 58

1. THE COMPELLED DISCLOSURE OF PERSONAL INFORMATION DOES NOT FURTHER A SUBSTANTIAL GOVERNMENTAL INTEREST AND IS NOT SUBSTANTIALLY RELATED TO ANY SUCH INTEREST .................. 58

2. THE COMPELLED PERSONAL DISCLOSURES VIOLATE OWNER AND ENTERTAINERS' RIGHTS TO PRIVACY AND ANONYMITY.... 63

C. THE INSPECTION PROCESS IS UNCONSTITUTIONAL........................ 67

D. LICENSE AND PERMIT FEES........... 70

E. THE LICENSING PROVISIONS OF CH. 6.54 EFFECTUATE AN IMPERMISSIBLE ABSOLUTE PRIOR RESTRAINT ON "NEW ENTERTAINERS" .................. 75

F. THE LICENSING AND PERMITTING PROCESSES OF CH. 6.54 DO NOT REQUIRE THAT GOVERNMENT BEAR THE BURDEN OF INITIATING LITIGATION AND OF PROOF ........................ 85

G. THE UNCONSTITUTIONALITY OF THE REVOCATION/SUSPENSION PROVISIONS OF CH. 6.54 .................... 88

1. SECTION 6.54.150(A)(8).................. 91

VI. NON-LICENSING PROVISIONS OF CHAPTER 6.54 THAT ARE UNCONSTITUTIONAL ................................................ 96

A. THE "PROHIBITIONS AND UNLAWFUL SEXUAL ACTS" PROVISIONS.... 96

1. THE "NO PHYSICAL CONTACT" PROVISIONS OF §6.54.140(C)........ 98

a. VAGUENESS .............................. 99

b. LACK OF MENS REA REQUIREMENT .............................. 100

c. OVERBREADTH/FREEDOM OF ASSOCIATION/SUBSTANTIVE DUE PROCESSW VIOLATION..... 102

2. THREE "THREE-FOOT" BUFFER ZONE.............................................. 103

a. VAGUENESS ............................ 106

b. NO MENS REA REQUIREMENT ......................................... 108

c. THE FLOATING THREE FOOT BUFFER ZONE IS UNCONSTITUTIONAL UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT .................. 109

i. THE THREE FOOT FLOATING BUFFER ZONE IS NOT CONTENT-NEUTRAL.......... 111

ii. EVEN IF CONTENT-NEUTRAL, THE THREE FOOT BUFFER ZONE VIOLATES THE FIRST AMENDMENT................................... 114

iii. THE ABORTION BUFFER ZONE CASE........................ 120

d. THE THREE FOOT BUFFER ZONE UNCONSTITUTIONALLY PRECLUDES PURE VERBAL LAWFUL SPEECH .................... 128

- e. THE BUFFER ZONE AS CONTAINED IN CH. 6.54 IMPERMISSIBLY PRECLUDES VARIOUS ATTRIBUTES OF THE CONTENT OF THE SYMBOLIC EXPRESSION AS CONVEYED BY EROTIC PERFORMANCE DANCE ENTERTAINMENT ........................... 130
- f. THE EFFECT OF THE BUFFER ZONE ON THE NUMBER OF SPEAKERS AND LISTENERS .... 134
- g. THE ECONOMIC IMPACT UPON ENTERTAINERS AND CABARETS AS A RESULT OF THE DISTANCE REQUIREMENT IMPERMISSIBLY RESTRICTS FIRST AMENDMENT RIGHTS, THEREBY RENDERING THE BUFFER ZONE UNCONSTITUTIONAL ...................................... 137
- h. THE THREE FOOT BUFFER ZONE UNCONSTITUTIONALLY IMPINGES UPON THE LIBERTY AND FREEDOM OF ASSOCIATION RIGHTS OF THE ENTERTAINERS, AS WELL AS THEIR SUBSTANTIVE DUE PROCESS RIGHTS .................... 147

B. HOURS OF OPERATION ..................... 149

C. THE ENTERTAINMENT PRICE SIGNAGE REQUIREMENT ............................ 151

D. THE "RESPONSIBILITIES OF THE OPERATOR' PROVISIONS OF CH. 6.54, INDIVIDUALLY AND AS COMBINED WITH §6.54.050(A), ARE VAGUE AND OVERBROAD AS THEY ARE IMPOSSIBLE TO COMPLY WITH, UNDULY OPPRESSIVE, AND CONTRADICTORY .............................. 151
  1. THE NASHVILLE ORDINANCE .... 151
  2. DEJA VU OF NASHVILLE .............. 155
  3. THE NASHVILLE ORDINANCE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD .......................... 156
    a. §6.54.130(D)-(K) AND §6.54.050(a) ARE VAGUE AND UNENFORCEABLE BECAUSE THEIR PROVISIONS ARE OPEN TO MULTIPLE INTERPRETATIONS AND GIVE LAW ENFORCEMENT OFFICERS UNFETTERED DISCRETION IN DETERMINING WHAT CONSTITUTES A VIOLATION ON THE RULE .......................................... 158
    b. THE BOOTH AND ROOM REQUIREMENTS OF §6.54.130(D)-(K) INDIVIDUALLY, AND AS COMBINED WITH §6.54.050(A) ARE OVERBROAD ..................... 164
E. THE IMPERMISSIBLE DISCRETION AFFORDED TO THE "SEXUALLY ORIENTED BUSINESS LICENSING BOARD" ............................................. 168
F. THE DEFINITIONS AS CONTAINED IN CH. 6.54 ARE HOPELESSLY VAGUE AND CONFUSING ............................... 169

VII. THIS COURT MUST ENJOIN THE ENTIRE ORDINANCE AND CANNOT SEVER OUT THE IMPERMISSIBLE SECTIONS .............. 171
VIII. CONCLUSION ................................................ 172

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, INC., et al.,<br>Plaintiffs,<br>v.<br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,<br>Defendants. | ) | No. 3-97-1066<br>Judge Nixon<br>Magistrate Judge Griffin |
| JERRY C. PENDERGRASS, et al.,<br>Plaintiffs,<br>v.<br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,<br>Defendants. | ) | Consolidated Cases<br>No. 3-97-1176<br>Judge Nixon<br>Magistrate Judge Griffin |

---

# NOTICE OF DEPOSITIONS OF REPRESENTATIVES OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

---

Plaintiffs, Deja Vu of Nashville, Inc., a Tennessee corporation, Michael Rucker, Michael Butler, Meroney Entertainment, Inc., d/b/a Ken's Gold Club, a Tennessee corporation, and the Pleasure Palace, Inc., a Tennessee corporation, by and through counsel and pursuant to Fed.R.Civ.P. Rule 30(b)(6), hereby give notice of the deposition of the Government of Nashville and Davidson County. The deposition(s) shall commence on a date and at a time agreed to by the parties and as approved by the District Court, at the law offices of John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, and shall continue from day-to-day until completed.

You are to designate and produce for deposition one or more officers, directors, or managing agents, or other persons who consent to testify on behalf of the Metropolitan Government of Nashville and Davidson County, who possess the knowledge to testify on its behalf in regard to the following matters:

1. The initial proposal of and subsequent drafting, revisions, adoption, and enactment by the Metropolitan Government of Nashville and Davidson County of the ordinance to amend Title 6 of the Metropolitan Code of Laws by adding a new Chapter 6.54 (hereinafter referred to simply as "Chapter 6.54").

2. The initial proposal of and subsequent drafting, revisions, adoption, and enactment of any amendments by the Metropolitan Government of Nashville and Davidson County to Chapter 6.54.

3. Any and all documents[1] submitted to the Metropolitan Government of Nashville and Davidson County

---

[1] The term "document" as used herein means any memorandum, report, study, contract, agreement, chart, graph, index, data sheet, data processing card or tape, note, notebook, diary, correspondence, entry, telegrams, letter, ledger, advertisement, brochure, circular, tape, record, bulletin, paper, book, pamphlet, account, photograph, report, analysis, calculation, and any other written, typewritten, handwritten or other graphic matter, any electronic or other recording of any kind or nature, any mechanical or electronic sound recordings or transcripts thereof, however produced or reproduced, and all copies of facsimiles of such documents by whatever means made.

and/or to the Council of the Metropolitan Government of Nashville and Davidson County regarding, concerning, related to, or in furtherance of the initial proposal of and subsequent drafting, revisions, adoption, and enactment by the Metropolitan Government of Nashville and Davidson County Chapter 6.54.

4. Any and all documents submitted to the Metropolitan Government of Nashville and Davidson County and/or to the Council of the Metropolitan Government of Nashville and Davidson County regarding, concerning, related to, or in furtherance of the initial proposal of and subsequent drafting, revisions, adoption, and enactment of any amendments to Chapter 6.54.

5. Any and all documents relied upon by the Metropolitan Government of Nashville and Davidson County and/or the Council of the Metropolitan Government of Nashville and Davidson County regarding, concerning, related to, or in furtherance of the initial proposal of and subsequent drafting, revisions, adoption, and enactment by the Metropolitan Government of Nashville and Davidson County of Chapter 6.54.

6. Any and all documents relied upon by the Metropolitan Government of Nashville and Davidson County and/or the Council of the Metropolitan Government of Nashville and Davidson County regarding, concerning, related to, or in furtherance of the initial proposal of and subsequent drafting, revisions, adoption, and enactment of any amendments to Chapter 6.54.

7. Each and every governmental interest meant to be furthered by the provisions of Chapter 6.54.

8. Each and every governmental interest meant to be furthered by any amendments to Chapter 6.54.

9. The purpose and intent behind the provisions of Chapter 6.54.

10. The purpose and intent behind any amendments to Chapter 6.54.

11. The manner by which the provisions of Chapter 6.54 further the governmental interests described in requests 7 and 8 above.

12. The manner by which any amendments to Chapter 6.54 further the governmental interests described in requests 7 and 8 above.

14. The method or manner by which the documents as referenced in requests 3 and 5 above establish that the provisions of Chapter 6.54 were meant to address the governmental interests as set forth in request 7 above.

15. The method or manner by which the documents as referenced in requests 4 and 6 above establish that any amendments to Chapter 6.54 were meant to address the governmental interests as set forth in request 8 above.

16. The method or manner by which the documents as referenced in requests 3 and 5 above establish that the provisions of Chapter 6.54 will in fact further the governmental interests as referenced in request 7 above.

17. The method or manner by which the documents as referenced in requests 4 and 6 above establish that any amendments to Chapter 6.54 will in fact further the governmental interests as referenced in request 8 above.

18. The definition and interpretation of any provisions of Chapter 6.54 which are not specifically defined in that ordinance.

19. The definition and interpretation of any provisions in any amendments to Chapter 6.54 which are not specifically defined in those amendments.

20. The creation of and appointment of persons to the "Sexually Oriented Business Licensing Board" as discussed in §6.54.020 of Chapter 6.54.

21. The purpose or purposes behind and the reasons for the Sexually Oriented Business Licensing Board adopting and enacting any rules, policies, or procedures pursuant to the authority conferred on it by Chapter 6.54 or any amendment thereto.

22. The provisions of, definitions applicable to, and interpretation of any and all rules, policies, or procedures either considered or enacted by the Sexually Oriented Business Licensing Board.

23. What effect, if any, that the zoning provisions as set forth in the Metropolitan Code of Law, which relate to sexually oriented businesses/establishments (as that term is generally defined in Chapter 6.54) have had within the City of Nashville and Davidson County on any perceived adverse secondary effects engendered by such businesses.

24. The evidence, materials, studies, judicial opinions, reports and articles referenced in Section 1(B) to Chapter 6.54 ('finding"), and how the same relate to:

A. The additional findings as contained in subparagraphs (B)(1) through (B)(32) of Section 1 of Chapter 6.54;

B. The necessity for the various provisions of Chapter 6.54 and any amendments thereto; and

C. How the provisions of Chapter 6.54 and any amendments thereto further any of the governmental interests referenced in requests 7 and 8 above.

25. The basis or bases for each of the preambles ("wherefore" paragraphs) and "findings" as set forth in Section 1(B) of Chapter 6.54, inclusive of the initial "findings" paragraph and subparagraphs 1 through 32 thereto (these various findings as contained in subsection "(B)" of Section 1 of Chapter 6.54, including the initial "findings" paragraph and subsections 1 through 32 inclusive, are referred to hereinafter as simply the "findings").

26. Any and all documents and information utilized, relied upon, or referenced in preparing the preambles (the "whereas" paragraphs) and findings to Chapter 6.54.

27. The method, manner, reason, or basis (or bases) as to why the findings support the enactment of each and every provision of Chapter 6.54.

28. The method, manner, reason, or basis (or bases) as to why the findings support the enactment of any amendments to the provisions of Chapter 6.54.

29. Any further preambles or additional findings (not limited to the definition of this word as set forth above) associated with any proposed or enacted amendments to Chapter 6.54.

30. Any and all documents prepared for the enforcement or interpretation of Chapter 6.54.

31. Any and all documents prepared for the enforcement or interpretation of any amendments to Chapter 6.54.

32. Criminal statistics and other records or information evidencing incidents of all criminal activity at or in the areas near businesses in Davidson County which are open and attract customers either on a 24 hour basis or during the hours between 2:00 a.m. and 6:00 a.m. on weekdays and between the hours of 3:00 a.m. and 12:00 noon on Sundays.

33. Information regarding the enactment and enforcement of similar laws which establish that the type of provisions found within Chapter 6.54 and any amendment thereto further the government interests discussed in requests 7 and 8 above.

34. The identities of each and every "adult entertainment establishment" (as that phrase was used in the original drafts of Chapter 6.54 and as was modified to refer to "sexually oriented business/establishment") located within Davidson County

35. The public disclosure policies and requirements regarding information supplied by license and permit applicants and their agents and representatives pursuant to the provisions of Chapter 6.54 and any amendments thereto.

36. Other businesses operating in Davidson County, or other individuals working in Davidson County, who/which are required to disclose and provide the information required by Chapter 6.54 in order to be able to obtain a permit or license to be able to work/operate within the County.

37. The method by which the license and permit fees, and the applicable renewal fees, were determined.

38. Closing hour requirements for businesses licensed by the Metropolitan Government of Nashville and Davidson County.

39. Any and all documents requested in Plaintiffs' Request for Production of Documents by Plaintiffs to Defendants previously submitted.

Dated: August 28, 1998

/s/ Bradley J. Shafer
Bradley J. Shafer, MI P36604
Shafer & Associates, P.C.
Attorneys for Plaintiffs
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
517-886-6560 – Telephone

## IN THE UNITED STATES DISTRICT COURT
## FOR THE MIDDLE DISTRICT OF TENNESSEE
## NASHVILLE DIVISION

**DEJA VU OF NASHVILLE, INC. a Tennessee Corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation, THE PLEASURE PALACE, INC. a Tennessee corporation; CAROUSEL AMUSEMENT CENTER, INC., a Tennessee corporation; DAWN PIERCE and ELIZABETH MARTZ, individually,**

**Plaintiffs,**

**v.**

**METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMITT TURNER, Chief of Police of the Metro Police Department**

**Defendants.**

**CIVIL ACTION NO. 3-97-1066**

**CONSOLIDATED WITH 3-97-1176**

**JUDGE NIXON**

**MAGISTRATE JUDGE GRIFFIN**

---

## REQUEST FOR PRODUCTION OF DOCUMENTS BY PLAINTIFFS TO DEFENDANTS

---

TO: Metropolitan Government of
Nashville and Davidson County
and Emmitt Turner, Chief of
Police of Metro Police
Department, c/o Francis H.
Young, Shayna Abrams,
Metropolitan Attorneys
204 Metropolitan Courthouse
Nashville, TN 37201

John E. Herbison, Esq.
2016 Eight Avenue South
Nashville, TN 37204

H. Louis Sirkin, Esq.
920 Fourth and Race Tower
105 West Fourth Street
Cincinnati, OH 45202-2776,
Attorneys for Jerry C. Pendergrass,
The 822 Corporation and 421 Corporation
Plaintiffs in Intervention

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Deja Vu of Nashville, Inc., Michael Rucker, Michael Butler, Meroney Entertainment, Inc., Ken's Gold Club, The Pleasure Palace, Inc., Carousel Amusement Center, Inc., Dawn Pierce and Elizabeth Martz, Plaintiffs, hereby request that Defendants produce the documents hereinafter described and permit Plaintiffs or their agents and/or attorneys to inspect and copy said documents. You may comply with this request for production of documents by supplying copies of the requested documents to the undersigned counsel at the addresses below no later than May 24, 1998, and you shall file any objections to these requests by that date. In the alternative, you may comply with these requests for production of documents by permitting physical inspection and examination by Plaintiffs and/or their agents and attorneys of the documents requested herein no later than May 24, 1998.

## DEFINITIONS AND INSTRUCTIONS

1. This Request for Production shall be deemed continuing in nature, calling for prompt production by Defendant of any and all documents which come into its actual or constructive possession, trust, care or control at any time in the future, as well as any and all documents now in its actual or constructive possession, trust, care or control. The specificity of any request shall not be construed as reducing the scope of any more generalized request.

2. The term "document" as used herein means any writing, letter, opinion, printing, memorandum, report, compilation, survey, summary, evaluation, correspondence, list, directive, study, contract, agreement, chart, graph, index, data sheet, data processing card or tape, note, entry, telegrams, telefax, advertisement, brochure, circular, tape, record, bulletin, paper, book, pamphlet, account, photograph, magazine or newspaper article, records of meetings, conference records, telephone records, records or conversations or any other form of communication, journal, and any other written, typewritten, handwritten, or other graphic matter, any electronic or other recording of any kind or nature, any mechanical or electronic sound or video recordings or transcripts thereof, however produced or reproduced and all copies of facsimiles of documents by whatever means made.

3. The phrase "relating to" includes referring to, pertaining to, reflecting, embodying, connected with, commenting on, responding to, showing, describing,

analyzing, containing, having, discussing, or concerning in any manner or fashion whatsoever.

4. If you object to producing any documents otherwise requested herein on the basis of a claim of privilege, please:

> A. Identify each such document with sufficient particularity as to author(s), addressee(s) or recipient(s), and the contents thereof so as to allow Plaintiff to bring the matter before the Court;
>
> B. Identify all persons in possession of each such document;
>
> C. State the nature of the privilege(s) asserted;
>
> D. State in detail the factual basis for the claims of privilege.

5. The phrase "Chapter 6.54" as used herein shall refer to Davidson Metropolitan County Council Bill No. 097-796 passed on third reading by said Metropolitan County Council on August 19, 1997 and approved by the Honorable Phillip Bredesen, Metropolitan Mayor, on August 25, 1997, amending Title 6 of the Davidson County Metropolitan Code of Laws.

6. The phrase "Metropolitan Council" as used herein shall refer to the members of the Metropolitan County Council of the Metropolitan Government of Nashville and Davidson County, as well as the staff, employees, agents and attorneys of the Metropolitan Council as a whole, any individual member thereof, and/or any council, committee or subcommittee.

## DOCUMENTS TO BE PRODUCED

The Plaintiffs request that the Defendants produce and make available for inspection and copying, separately in response to each numbered paragraph, all documents which contain, in whole or in part, which refer to, in whole or in part, of which reflect, in whole or in part, information relating to the following:

***REQUEST NO. 1*:** Please produce Section 2.01(40) of the Charter of the Metropolitan Government of Nashville and Davidson County.

***REQUEST NO. 2*:** Please produce transcripts and/or tape recordings of any council or council committee hearings at which evidence concerning the adverse secondary effects of adult uses on the community was presented to the Metropolitan Council in the course of its consideration and adoption of Chapter 6.54 and any amendments adopted, rejected or accepted from the time of its original introduction, its passage on third reading, its approval by Mayor Bredesen, and thereafter and transcripts and/or tape recordings of any council or council committee hearings or debates at which Chapter 6.54 or any proposed, adopted or rejected amendment was considered, debated or voted upon.

***REQUEST NO. 3*:** Please produce any findings incorporated in the several court decisions listed in Section 1(B) of Chapter 6.54 which were relied upon by the Metropolitan Council in the adoption of Chapter 6.54 and which are not set forth in the printed version of the several cases referred to therein, to wit: *D.L.S., d/b/a Diamonds and Laces Show Bar v. City of Chattanooga*, 107 F.3rd 403 (Six Cir. 1997); *D.L.S., Inc., a/b/a Diamonds and Lace Show Bar v. City of Chattanooga*, 914 F.Supp. 193 (E.D. Tenn.

1995); *D.L.S., Inc. a/b/a Diamonds and Lace Show Bar v. City of Chattanooga*, 894 F.Supp. 1140 (E.D. Tenn. 1995); *City of Renten v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Colin A. Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

***REQUEST NO. 4***: Please produce all studies and judicial opinions concerning the adverse secondary effects of adult uses of the communities of Austin, Amarillo and Beaumont, Texas; Phoenix and Tucson, Arizona; Minnesota; Seattle, Washington, which were considered and relied upon by the Metropolitan Council in the adoption of Chapter 6.54.

***REQUEST NO. 5***: Please produce all reports from the police department and from the Department of Health of the Metropolitan Government of Nashville and Davidson County which the Metropolitan Council relied upon in consideration and adoption of Chapter 6.54.

***REQUEST NO. 6***: Any and all documents submitted to, relied upon or serving as bases for the several conclusions and/or findings of the Metropolitan Council contained in subparagraphs 1(B)1 through 1(B)32 of Chapter 6.54.

***REQUEST NO. 7***: Copies of any and all reports and recommendations from employees, citizens, other local governments, and other reputable sources as referred to in the third whereas clause on page 1 of Chapter 6.54 which support the conclusion set forth in said whereas clause that "locational criteria alone do not adequately protect the health and general welfare of the people of Metropolitan Nashville and Davidson County" or which support any other conclusion, determination or finding made by the Metropolitan Council in the drafting, consideration and passage of Chapter 6.54, and any amendments thereto whether adopted before or after the passage of Chapter 6.54.

***REQUEST NO. 8***: Please produce copies of any and all reports, studies or evidence showing or demonstrating that there is not a connection or nexus between undesirable adverse secondary effects in adult entertainment establishments in Nashville and Davidson County or elsewhere or which show that adverse secondary effects produced by adult entertainment establishments such as those operated by Plaintiffs or in which Plaintiffs are employed are no greater than produced by other types of businesses such as convenience stores, gas stations and other places of business which are open and attract customers either on a 24 hour basis or during extended evening hours.

Respectfully submitted,

DEJA VU OF NASHVILLE, INC. a
Tennessee Corporation; MICHAEL
RUCKER, individually; MICHAEL
BUTLER, individually; MERONEY
ENTERTAINMENT, INC., d/b/a
KEN'S GOLD CLUB, a Tennessee
corporation, THE PLEASURE
PALACE, INC. a Tennessee
corporation; CAROUSEL AMUSEMENT
CENTER, INC., a Tennessee
corporation; DAWN PIERCE and
ELIZABETH MARTZ, individually,

By: /s/ Michael F. Pleasants
Michael F. Pleasants
8 South Third, Suite 200
Memphis, Tennessee 38103
901/572-7332 – Telephone
901/573-7399 – Facsimile

By: /s/ Bradley J. Shafer, by MFP
Bradley J. Shafer
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110
517/886-6560 – Telephone
517/886-6565 – Facsimile

ATTORNEYS FOR PLAINTIFFS

## CERTIFICATE OF SERVICE

I, Michael F. Pleasants, do hereby certify that I have served a true and exact copy of the request for production of documents of Plaintiffs to Defendants upon all counsel set forth on the first page of this request for production of documents by United States Mail, First Class postage prepaid, this 24th day of April 1998.

/s/ Michael F. Pleasants
Michael F. Pleasants

AGENDA

April 27, 1999

9:00 a.m.

METROPOLITAN ADULT ENTERTAINMENT BOARD

700 SECOND AVENUE SOUTH

HOWARD OFFICE BUILDING NASHVILLE

---

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206
(615) 262-9592

[2] APPEARANCES

Mr. James Avril
Mr. Alan Banks, Sr.
Dr. Donald Boatright, Chair
Ms. Mary Martin Schaffner, Vice Chair
Reverend Becca Stevens
Ms. Leslie Shectner
Ms. Linda Borum

* * *

[10] Applications for adult entertainment licenses. Deja Vu of Nashville, 1214 Demonbreun Street.

[11] MS. BORUM: Our recommendation is that it does not comply with health inspections. Some of the items on that health inspection report is: To clean the couches, rest room walls, fixtures, shower stall; repair commode; provide covered waste containers. Charles, in his inspection, noted a violation of the 3-foot rule

MR. CHAIRMAN: All right.

MS. SCHAFFNER: I take it the fourth sheet back in the packet is the health inspection report?

MS. BORUM: That is correct.

MS. SCHAFFNER: And that inspection indicates that the couches need to be cleaned. Sanitation of the floors and the cubicles need to be improved. Covered waste containers need to be provided throughout the establishment. The commode in the dressing room needs to be repaired. The rest room walls and fixtures need to be cleaned. And the shower stall in the dressing room needs to be cleaned; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: Then . . .

MR. CHAIRMAN: Okay. So that it . . .

MS. SCHAFFNER: Then the inspector's report is the last sheet; is that right?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the inspector's [12] finding upon inspection was that the dancers were in violation of the 3-foot rule; is that correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: On the codes or building there was no findings since there were no booths; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: And as far as the police report, it was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the zoning was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that we deny this application on the basis of the health inspection and the – this board's inspector's report.

MR. CHAIRMAN: It has been moved that we deny this report based on the – deny this application based on the inspector's report and this report from health.

Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussions? All in favor signify by aye.

(All board members voted aye.)

[13] MR. CHAIRMAN: This application is denied.

* * *

[15] The next application is Pleasure Palace, 2407 Dickerson Pike.

Ms. Borum.

MS. BORUM: Our recommendation is that it does not comply with health codes. Some of those items were: Repair hand sink; clean walls and all air conditioning vents; clean storage areas; provide hand towels.

On your checklist sheet from Charles and myself, we received a late report yesterday afternoon from the building inspector who went out and made another inspection and approved the booth requirements.

MS. STEVENS: What does nonconforming mean?

MS. BORUM: Legally, "nonconforming" means that it was there prior to the funding. It's grandfathered in.

MS. SCHAFFNER: I take it that the building inspector's report disapproval since it . . .

MS. BORUM: It is marked disapproved on the checklist. I was handed the report about 5 until 4 yesterday afternoon.

MS. SCHAFFNER: Which disapproves or [16] approves?

MS. BORUM: That approves, as far as the building inspector.

MS. SCHAFFNER: So the only thing that's disapproved, then, is the health . . .

MS. BORUM: That is correct.

MS. SCHAFFNER: . . . report, which includes a need for repairing hand sink for the ease of cleaning; thoroughly cleaning the walls in booths and air conditioning vents in the hall; providing a minimum of 10-foot candles of illumination at the floor level in booths; cleaning up storage areas; eliminate all unnecessary items on lower level; and provide hand towels in the bathrooms; is that correct?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that this application be denied on the basis of the health report.

MR. CHAIRMAN: It has been moved that this application be denied on the basis of the health report. Is there a second?

MS. STEVENS: Second.

* * *

[26] MR. CHAIRMAN: The next is Club Platinum, 1711 Hayes Street.

MS. BORUM: We recommend disapproval. It does not comply with health code. Some of those items: Repair toilet; clean showers; eliminate storage that may attract rodents and insects.

MR. CHAIRMAN: Everything else is approved?

MS. BORUM: Yes, sir, everything else is approved.

MS. SCHAFFNER: So that includes repairing the toilet in the men's rest room, cleaning the floors along the lockers in the dressing room?

[27] MS. BORUM: That is correct.

MS. SCHAFFNER: Cleaning the showers in the dressing room, eliminating storage that may attract rodents and insects and cause – something.

MS. BORUM: Harborage.

MS. SCHAFFNER: What is harborage?

MR. CHARLES WATKINS: Places for rodents or insects to hide.

MS. SCHAFFNER: All right. I move this application be denied based upon the health inspection report.

MR. CHAIRMAN: Do we have a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health inspector's report. All in favor say aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Application is denied.

* * *

[35] The next application is 21 Up Video, 3920 Lebanon Pike

Ms. Borum.

MS. BORUM: We recommend disapproval. It does not comply with zoning. It does not comply with health. Some of those items were: Provide covered trash cans, hot running water and hand towels in the rest rooms.

MS. SCHAFFNER: Am I understanding when you say it doesn't comply with zoning is that it is not within the adult entertainment –

MS. BORUM: It's not within the adult entertainment overlay.

[36] MS. SCHAFFNER: – overlay or is not grandfathered in; is that correct?

MS. BORUM: Correct.

MS. SCHAFFNER: And the health report found that all garbage storage containers didn't have tight fitting lids or covers. There was not hot running water at the hand sink in the rest room. And there weren't individual hand towels in the rest room: is that right?

MS. BORUM: Yes, ma'am, correct.

MS. SCHAFFNER: I move that the application of 21 Up Video at 3920 Lebanon Pike be denied on the basis of not in conformance of the zoning requirements and in addition is in violation of the health code.

MR. CHAIRMAN: Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on zoning report and the health report. Is there any discussion? All in favor signify by aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Okay. The motion carries. This application has been denied.

* * *

[38] Purple Onion I, 2807 Nolensville Pike.

MS. BORUM: We recommend disapproval. Even though they are not in the adult entertainment overlay, they are legally nonconforming, so they do comply with zoning. They do not comply, though, with the booth requirement, no open sides. Walls not solid. Does not comply with health codes. Some of those items: Clean floors and walls; provide covered trash cans and hot running water.

MS. SCHAFFNER: Where is the – the report from? Who reports on the booths? Codes?

MR. CHAIRMAN: Codes.

MS. BORUM: Yes, ma'am, the building inspector. And that's on the third page, item three and six.

MS. SCHAFFNER: Number three: "Is access unobstructed by any door, gate, lock or any other control-type devices?" He checked no. Also checked no to all walls being solid without any openings, et cetera. In the summary report says it does not comply with the codes; is that correct?

MS. BORUM: Yes, ma'am, that's correct.

MS. SCHAFFNER: And as far as the health report, it says they need to clean the floors and walls in the rest room; provide covered trash containers and tight [39] fitting lids in the bathroom and common area; provide hot running water in the rest room, right?

MS. BORUM: That is correct.

MS. SCHAFFNER: So as far as this checklist goes, in fact, it should be health, no, right?

MS. BORUM: Correct.

MS. SCHAFFNER: And . . .

MS. BORUM: And the building disapproved.

MS. SCHAFFNER: Building disapproved.

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: But the zoning is grandfathered in, correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: I move this application be denied on the basis of the failure to comply with health codes and building codes as contained in the codes inspector's report.

MR. CHAIRMAN: Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied. Is there any discussion? All in favor signify by aye.

(All board members voted aye.)

MS. STEVENS: I have a question for legal before we go on.

[40] MR. CHAIRMAN: This application is denied. Okay.

* * *

[45] The next application is Metro News, 822 5th Avenue South.

* * *

[47] MR. CHAIRMAN: Is there any discussions?

MS. STEVENS: I have a question on the health report. What happened to all that stuff that was [48] listed?

MR. BANK: Because they have approved it on the checklist.

MS. STEVENS: Just on the second page, third page.

MS. BORUM: Okay.

MR. BANKS: It said –

MS. BORUM: Yes, I'm sorry. That is disapproved, also for health. I'm sorry, I apologize.

MS. SCHAFFNER: I amend my motion.

MR. STEVENS: Thank you.

MS. SCHAFFNER: I withdraw that motion and move that the application be denied on the basis of the health violations, which include: The floors are not thoroughly cleaned throughout the facility and common areas and rest rooms and booths; walls on the upper floor leading to the booths and stairways were not clean; the lighting was insufficient; the lids and covers on the garbage cans were not tight fitting; there wasn't hot running water in the rest room in the basement and hand towels in the rest room in the basement, women's rest room. And, in addition, that it be disapproved on the basis of the applicant had been convicted of – what is the phrase for it?

MS. SHECTNER: Misdemeanor. Crime of a [49] sexual nature was a misdemeanor.

MS. SCHAFFNER: Misdemeanor crime of a sexual nature. For those reasons, I move it to be disapproved.

MR. BANKS: Mr. Chairman, could I ask one more question? On the guideline, if you'll turn the diagram. The bottom left it says, "Doors to video booths will be removed upon submission of license application." That may or may not have been done. I do know that on this diagram all the booths had doors on them.

MS. BORUM: The inspector's report is the fifth page.

MR. BANKS: I just needed something that says – okay. We didn't know we had that.

MS. BORUM: The summary report, "The business located complies."

MR. BANKS: Okay. So that we would refer to the building report, right?

MS. BORUM: That is right.

MR. CHAIRMAN: The motion you have before the board is that this application be denied based upon the background report of a misdemeanor sexual offense as well as the health inspector's report.

MS. STEVENS: Second.

MR. CHAIRMAN: Okay. All in favor – it [50] has been moved and seconded that we – all in favor signify by saying "aye."

(All board members voted aye.)

MR. CHAIRMAN: Any nays? This motion carries. This application is denied.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC.,
et al.,

Plaintiffs,

vs.

No. 3-97-1066
Judge Higgins

METROPOLITAN GOVERNMENT
OF NASHVILLE, AND DAVIDSON
COUNTY, TENNESSEE, et al.,

Defendants.

---

TRANSCRIPT OF PROCEEDINGS –
PRELIMINARY INJUNCTION

VOLUME III of Three

BEFORE THE HON. THOMAS A. HIGGINS, U.S.
District Judge

on April 15, 1999

---

APPEARANCES:

As hereinbefore noted.

[506] THE COURT: . . . And we have never really resolved this notice of filing. Is there any objection by the plaintiff to the court's consideration of this as evidence in the record?

MR. SHAFER: Which one? Is that the secondary effects?

THE COURT: It's 147.

MR. CHARLES: Yes, Your Honor, that's the secondary.

MR. SHAFER: No objection, Your Honor.

THE COURT: This is the information that was placed in front of the metropolitan council.

MR. CHARLES: That's correct, Your Honor.

THE COURT: All right. There is no objection –

MR. SHAFER: No objection.

THE COURT: – to the court's consideration of it. All right.

* * *

[507] MICHAEL W. RUCKER,

being previously duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. SHAFER:

Q. Mr. Rucker, we went through this before. You're the president and general manager of Deja Vu, correct?

A. That's correct.

Q. And was Deja Vu recently visited by the Metropolitan Government of Nashville and Davidson County Public Health inspectors about a week ago?

A. Eight days from today, correct.

Q. April 7th?

A. Correct.

Q. And was there a health report that was issued by the health inspectors in regard to that inspection?

A. That is correct.

Q. And was it given to you?

A. That's correct.

Q. Now, sir, in front of you we have marked in Exhibit No. 22. Has a sticker on the back of it.

[508] A. Right.

Q. Is that a copy of the report that the public health inspectors gave you a little over a week ago?

A. Yes, it is.

Q. Now, sir, I didn't mark the original, but the original's to your side, is that correct?

A. That's correct.

Q. All right. That's what we have marked now as Exhibit 22, is a true and accurate copy of that?

A. Yes, it is.

MR. SHAFER: Your Honor, I move for the admission of Exhibit 22.

MR. CHARLES: If Your Honor please, could I ask why we're just now being handed an exhibit that was completed on April 7th, 1999?

MR. SHAFER: Because ten minutes ago, Your Honor, the public health officials were again in Deja Vu and issued a new report which is markedly different. That is going to be Exhibit 23, and this is what he has in front of him. It had no relevance until about ten minutes ago.

MR. CHARLES: I have no objection, Your Honor.

THE COURT: 22, health inspector report, dated April 7, '99, is received in evidence, without objection.

MR. SHAFER: Thank you, Your Honor.

BY MR. SHAFER:

[509] Q. Now, Mr. Rucker, what score did Deja Vu get on this health report that was done a week and a day ago?

A. Our score was a 99.

Q. Out of what?

A. One hundred.

Q. You lost one point, right?

A. That's correct.

Q. And what was that for?

A. We had a broken floor tile behind the bar.

Q. All right. Now, sir, you and I came back from lunch and went over to the club just a few minutes ago?

A. That's correct.

Q. And had the health inspectors once again visited Deja Vu?

A. That's correct.

* * *

Q. Mr. Rucker, is Exhibit 23 a copy of the document that was left by the health inspectors just moments ago at the [510] Deja Vu Club in regard to the additional inspection they did today?

A. That's correct.

Q. And the original, I apologize, I didn't ask the court clerk to make a copy of it, but the original that you have on the side of you, has the card stapled to it of the individual you just identified?

A. That's correct.

Q. All right.

MR. SHAFER: Your Honor, I move for admission of Exhibit 23. Plaintiffs' Exhibit 23.

MR. CHARLES: I have no objection, Your Honor.

THE COURT: 23 is a health inspector report dated 4-15-99, it's received in evidence, without objection.

MR. SHAFER: Thank you, Your Honor.

MR. CHARLES: Your Honor, would it be possible to refer to the two exhibits by their titles? Because they have –

THE COURT: Well, what is the proper title? I haven't seen the document, they have just been referred to as a health inspector report.

MR. CHARLES: May I approach the bench?

THE COURT: Sure. Pass it up. Well, the one dated 4-15-99 is captioned Metropolitan Health Department of Nashville and Davidson County, Sexually Oriented Business [511] Inspection Report.

The one dated 4-7-99 is captioned Metropolitan Health Department of Nashville and Davidson County, Tennessee, Food Service Establishment Inspection Report.

All right.

MR. SHAFER: Thank you, Your Honor.

BY MR. SHAFER:

Q. Now, Mr. Rucker, I want to go into the remarks section of Exhibit 23. You see there's a number of things written down there?

A. Yes, I do.

Q. I want to start from the bottom and work my way up, okay?

When you had the inspection a week and a day ago, were there any concerns by the public health officials about clean shower stall in dressing room?

A. No, sir.

Q. When you had the public health inspection a week and a day ago were there any concerns raised to you about clean restroom walls and fixtures?

A. No, there was not.

Q. Mr. Rucker, when you had your inspection by the public health inspector a week and a day ago, were there any concerns expressed to you by that individual to repair commode in dressing room?

[512] A. No.

Q. Mr. Rucker, when you had the inspection a week and a day ago were there any concerns expressed to you to provide covered waste containers throughout?

A. No.

Q. How about floors must improve sanitation in floors in cubicles?

A. I have never heard that as well.

Q. How about clean couches in cubicles?

A. No.

Q. How about rest rooms?

A. No.

Q. What does that mean to you, the word rest rooms?

A. Well, I think that's the end of a sentence from the beginning.

Q. Oh, I'm sorry. You're right. Okay.

So the last, the first one actually is floors and walls must be light colored, non – absorbent, smooth textured and easily cleanable in each room and restroom, see that?

A. Yes, I do.

Q. That was not raised a week and a day ago, right?

A. No, it was not.

MR. SHAFER: Those are all the questions I have of Mr. Rucker, Your Honor.

THE COURT: All right.

* * *

[622] THE COURT: Mr. Young, anything by the defendant?

MR. YOUNG: I'll defer – well, Judge, we wanted to clear up at least one thing about the big thick book with the multi color tabs on it.

MR. CHARLES: Your Honor, may I respond?

THE COURT: That's Defendant's Exhibit 1, Docket Entry 147, evidence of secondary effects. Would it just simplify this to have a defendants' tag put on it right here in the lower left-hand corner and both be Docket Entry 147 [623] and also an exhibit in this evidentiary record?

MR. CHARLES: Yes, Your Honor.

THE COURT: All right. 1, without objection, is received in evidence.

MR. SHAFER: Yes, Your Honor, without objection.

THE COURT: Received 4-15-99. Put a defendants' one tag on it.

* * *

AGENDA

May 11, 1999

7:30 a.m.

METROPOLITAN ADULT
ENTERTAINMENT BOARD

700 SECOND AVENUE SOUTH

HOWARD OFFICE BUILDING NASHVILLE

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206

(615) 262-9592

[2] APPEARANCES

Mr. Alan Banks, Sr.
Dr. Donald Boatright, Chair
Ms. Mary Martin Schaffner, Vice Chair
Reverend Becca Stevens
Ms. Shana Abrams
Ms. Linda Borum

* * *

[5] (Whereupon, the Metropolitan Adult Entertainment Board Meeting began at 7:30 a.m. on May 11th, 1999, and proceeded as follows:)

MR. CHAIRMAN: We'll go ahead and call the meeting to order of the Metropolitan Adult Entertainment Board, meeting for May 11th, 1999.

We're going to begin by opening up the agenda for discussion of requests for re-inspection.

Do you have those requests for re-inspection?

MS. BORUM: Yes, I do. Okay. We have a request from Ken's Gold Club at 500 5th Avenue South. We have a health inspection, and we also have a report from Mr. Watkins that they meet the requirements. And we recommend approval of this license.

* * *

[18] MS. SCHAFFNER: If the board were to give you some time to look into that, would you be willing to waive your time limits in writing?

KEN MERONEY: I need to ask counsel about that.

[19] UNKNOWN ATTORNEY: No.

MR. CHAIRMAN: Basically, we have the report from the codes inspector and the board's inspector.

Is there a motion from the board to approve the application? Is there a motion from the board to deny the application?

MS. SCHAFFNER: I move it be approved.

MR. CHAIRMAN: It has been moved. Is there a second that this application be approved? Is there a second?

MS. SCHAFFNER: It fails for want of the second; motion fails.

MR. CHAIRMAN: Motion fails for one of the second.

MS. STEVENS: Chairman, could I entertain a motion for it to be denied?

MS. BORUM: Could y'all all speak a little bit louder?

MR. CHAIRMAN: Your motion is what?

MS. STEVENS: I move, based on the codes report, based on the same reason that the motion was not ratified, it is still a booth and was not changed, and I move that the permit be denied.

MR. CHAIRMAN: We move that the permit be [20] denied on the basis of the codes inspector's report.

MS. STEVENS: And on the basis of the wall not being removed on the second floor.

MR. CHAIRMAN: There's a motion on the floor that the application be denied, the re-inspection application be denied. Is there a second?

MR. BANKS: I second that.

MR. CHAIRMAN: Is there any further discussion? All in favor that this application be denied signify by saying aye.

MR. BANKS: Aye.

MS. STEVENS: Aye.

MS. SCHAFFNER: Oppose

MR. CHAIRMAN: Two ayes, one oppose. Two to one opposed. So the motion is denied. Motion passes that this application be denied. The motion passes that this application be denied. The motion passes that this application be denied by a vote of two to one.

Let's move on to the next application.

* * *

---

METROPOLITAN ADULT
ENTERTAINMENT BOARD HEARING
700 Second Avenue South
Howard Office Building
Nashville, Tennessee 37201

Hearing: May 25 1999
Time: 9:00 a.m.

---

ELITE REPORTING SERVICES
MAX CURRY, B.C.R., CCR, CRI
Bachelor's Degree of Court Reporting
806 Porter Road
Nashville, Tennessee 37206

(615) 262-9592

---

[2] APPEARANCES

BOARD MEMBERS PRESENT

MR. DONALD BOATRIGHT, Chair

MS. MARY MARTIN SCHAFFNER, Vice-Chair

MR. ALAN BANKS, SR.

REV. BECCA STEVENS

APPEARING FOR METRO

MS. SHAYNA ABRAMS

MR. JAMES CHARLES

* * *

[47] DR. BOATRIGHT: Okay. It's been moved and seconded that we issue Ken's Gold Club an ordinance.

MR. CHARLES: A license.

DR. BOATRIGHT: A license. All in favor signify by saying 'aye'.

MR. BANKS: Aye

MS. SCHAFFNER: Aye

[48] DR. BOATRIGHT: All – nay?

MS. STEVENS: Nay.

DR. BOATRIGHT: It's two to one. The motion carries.

* * *

[80] DR. BOATRIGHT: Thank you for your arguments. The Board will entertain a motion for approval.

MS. SCHAFFNER: I move that it be approved. In support of that I would like to say that I think – I continue to believe there is ambiguity about what booths are in the ordinance, which I fervently hope will be addressed.

While there is ambiguity, I think that we are obligated to rule in favor of the applicants and their rights and let the ambiguity be clarified by Metro, if it is the intent of the Metro Council to prohibit. At this point I don't think that this is sufficiently clear, and for that reason I move that it be approved.

[81] DR. BOATRIGHT: Is there a second?

(No response heard.)

DR. BOATRIGHT: Any discussion?

(No response heard.)

DR. BOATRIGHT: Okay. The motion failed for second and Deja Vu's license is denied on appeal.

MR. RUCKER: Thank you for your time.

THE CLERK: I need a motion to deny it.

DR. BOATRIGHT: Okay. Is there a motion to deny the application?

MR. BANKS: I make the motion to deny the application.

DR. BOATRIGHT: Is there a second?

MS. STEVENS: Yes.

DR. BOATRIGHT: All in favor of denying?

MS. SCHAFFNER: Can I ask your reason?

MR. BANKS: I believe under the definition in the ordinance, it would be remiss of me to look at this and say this is not a booth. I believe it is a booth, and I believe there can only be one person in a booth.

MS. SCHAFFNER: But what is the definition of booth you are using to base your judgment on?

MS. STEVENS: Well, what I was using partly was – when everyone was talking, you described these club areas; and, secondly, it seems like if they are saying, [82] yes, we comply because we don't have this wall here, then it makes sense that you're talking about a booth. That's what everybody has been talking about the whole time we've been talking about it.

It seems like to me, as a Board member who is not from the legal profession, the best I can do is go by what my understanding of it is and go by the representations of the legal counsel we have been given.

MR. BANKS: Are these rooms, are these cubicles, are these closets, or are they booths?

MS. SCHAFFNER: I was just asking what definition you are using to call these booths?

MR. BANKS: These are separated from the general area. When – the other gentleman said, 'You know, this is really open and it's really just a part of the overall room; that you go in and' – I would assume if you do a table dance, you're going to pay for a private table dance. And I couldn't just walk up – walk in there and sit right next to somebody who paid for a private table dance. No, this is separated – a separated area from the general part of the – of the entertainment establishment; and, therefore, to me it's either a room or a booth, and I don't consider these rooms.

MS. SCHAFFNER: Okay.

MR. BANKS: And only one person can be in a [83] booth.

MS. STEVENS: I totally would love to have some clarification of this ambiguity cleared up, because it's very confusing.

DR. BOATRIGHT: Now, is there a second?

MS. STEVENS: Of what? For a motion to – we did it.

DR. BOATRIGHT: All right. She did it.

All in favor of denying the application signify by saying 'aye'.

MR. BANKS: 'Aye'.

MS. STEVENS: 'Aye'.

DR. BOATRIGHT: All in favor of.

MS. STEVENS: All opposed.

DR. BOATRIGHT: All opposed to the motion signify by saying 'nay'.

MS. SCHAFFNER: Nay.

DR. BOATRIGHT: Nay.

MS. STEVENS: Are you voting nay?

MS. SCHAFFNER: Well, I don't think you can vote acceptable.

MS. STEVENS: Can he vote?

MS. ABRAMS: (Shakes head negatively.)

DR. BOATRIGHT: It's two to one.

MS. STEVENS: The other thing I would like to [84] have on the record is what happened to the other Board member.

MS. SCHAFFNER: We have something else on the agenda.

MS. STEVENS: We do? What?

DR. BOATRIGHT: Another motion, Miko's.

MS. SCHAFFNER: Wait a minute. Okay.

DR. BOATRIGHT: Last thing – last item on the agenda is Miko's located at the 511 8th Avenue North. It was present at the last meeting. There was a request for withdrawing that application. Any change on that?

MR. KIRKLAND: I have not had any further communication from anyone, so I don't have anything further to offer this Board. I have not heard from Ms. Hunter. I have heard from Mr. Lynch. I have no reason to dispute Mr. Lynch's representation that he represents Ms. Hunter.

MS. SCHAFFNER: I would move that we withdraw.

MS. STEVENS: Seconded.

DR. BOATRIGHT: Is there a second?

MS. STEVENS: Yes, sir.

DR. BOATRIGHT: All in favor signify by saying 'aye'.

(WHEREUPON, responses of 'aye' were heard.)

[85] DR. BOATRIGHT: Okay. Motion carries.

* * *

[90] MR. COBB: Okay. This seems up to this point to be a constantly changing process, what – the

meaning of words change on an on-going basis, as we discussed this morning.

* * *

**Sexually Oriented Business Licensing Board**
*700 2nd Avenue South*
*Nashville, TN 37201*
*615-862-6556*

---

May 26, 1999

Mr. Mike Rucker
c/o Deja Vu
1214 Demonbreun Street
Nashville, TN 37203

Dear Mr. Rucker:

The Sexually Oriented Business Licensing Board met to consider your license application denial in response to you request for an evidentiary hearing on your previously denied application for a license to operate a sexually oriented business. This evidentiary hearing was held on Tuesday, May 25, 1999.

The Vice Chair made a motion to grant the application which failed for lack of a second. A board member then made a motion to deny the license application which received two votes for denial and two votes against denial.

Section 6.54.020(D)(3) states "The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits." Since the tie vote of two to two is not a "concurring vote of the majority". The license was neither approved or denied. Section 6.54.040(E) specifies that the Board must hold the hearing at the next regular meeting at which they shall affirm or reject the denial of the application.

Section 6.54.040(C)(3) states "If the board fails to meet in the time period specified or fails to have a quorum at the meeting, then the license shall be approved and sent to the applicant by United States Mail to the address listed on the application." Since the Board did not act on your application within fifteen days of your request for an evidentiary hearing, the license is granted.

/s/ Mary Martin Shaffner
Mary Shaffner, JD,
Vice Chair

Very truly yours,

/s/ Linda Borum w/permission
Linda J. Borum
Secretary, Sexually Oriented
Business Licensing Board

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,

Plaintiffs,

vs.

METROPOLITAN GOVERNMENT OF NASHVILLE, AND DAVIDSON COUNTY,

Defendant.

No. 3-97-1066
Judge Higgins

---

# TRANSCRIPT OF PROCEEDINGS – CASE MANAGEMENT CONFERENCE

BEFORE THE HON. THOMAS A. HIGGINS,
U. S. District Judge

on December 21, 1999

(Filed Jan. 14, 2000)

---

APPEARANCES:

Mr. Bradley J. Shafer
Attorney at Law
Lansing, Michigan,

Mr. Michael F. Pleasants
Attorney at Law
Memphis, Tennessee,

*on behalf of Deja Vu and others*;

Mr. John Herbison
Attorney at Law
Nashville, Tennessee,

*on behalf of Pendergrass*;

Mr. Francis Howard Young
Ms. Shayna R. Abrams
Attorneys at Law
Nashville, Tennessee,
*on behalf of the Defendant.*

[2] PROCEEDINGS

THE COURT: Have your seats, ladies and gentlemen. Call the case.

* * *

THE COURT: All right. Now, lady and gentlemen, what needs to be done in this case to get this case ready for trial?

MR. SHAFER: May I respond, Your Honor?

THE COURT: Yes, sir.

MR. SHAFER: Two primary things I believe before the court's ruling on the preliminary –

THE COURT: I'm sorry?

[3] MR. SHAFER: Before the court's ruling on the preliminary injunction motion, metro government enacted 52 changes to the ordinance. Since the court's ruling, they have proposed an additional, I don't know, about another ten amendments, I'm sure Mr. Young can tell you the exact status that that's in.

My understanding is there is a City Council, County Council meeting tonight, I'm not sure if it's for a second or a third reading, but certainly before we try the case I think I want to know exactly what the ordinances are we're dealing with.

So I believe that the court should at least give counsel an opportunity to finish up its ordinance, give the board whatever opportunity it wants to promulgate any type of new documents, rules or regulations so we would have that in hand to be able to try this.

The other thing is, Your Honor, we filed a motion back on November 4th of last year, it's Docket Nos. 65 and 66, the brief is 66, it's basically a discovery motion. A motion to review Magistrate Griffin's rulings on various discovery issues. We wanted such things as – we wanted someone, for example, to testify as to how various provisions of the ordinance were going to be interpreted, what some of the easements were for enacting some of the provisions, how the county believes that certain other [4] provisions will effectuate some of the governmental interests.

And if the court will recall during the lengthy evidentiary hearing that we had, I had Dr. Boatright, head of the Sexually-oriented Business Licensing Board, on the stand for the better part of a day, and at one point the court somewhat admonished me and said, Well, you know, Dr. Boatright's individual opinions are all well and good, but, I don't know (this was you saying this), I don't know what relevance that particularly has in regard to the constitutional issues here, at which time I pointed out to the court that we, in fact, had a pending motion because we wanted to take a 30(b)(6) deposition, make them bring in a deponent who would testify as to how certain provisions of the ordinance were to be interpreted and enforced.

* * *

[7] THE COURT: All of that is well and good. What do you need to do to get this case ready?

MR. SHAFER: Well, Your Honor, I need a ruling from the court in regard to our motion for review. That's number one.

I need to take whatever discovery this court is going to allow. Magistrate Griffin, in fact, –

THE COURT: What discovery do you need? What discovery do you say you need?

MR. SHAFER: Well, I believe I have already represented to the court previously when the court asked me this during the evidentiary hearing, I believe three or four depositions.

[8] THE COURT: Of whom?

MR. SHAFER: It would depend on what the court ruled and how the court ruled. It may be a 30(b)(6) deponent, it might be Mr. Boatright, it might be Mr. Watkins, it might be a representative of the SOB Board. It's really going to depend on how the court rules on the motion.

* * *

[13] THE COURT: Why shouldn't we try this case on the basis of the ordinance as amended as of the date that I acted on that preliminary injunction and bring this controversy to a conclusion and send it on to Cincinnati and then to Washington, if that's where it ultimately goes? Why should this court continue to be called upon to nibble at this matter in response to on-going amendments?

A lawsuit has to be crystalized at some point and cease being a moving target.

* * *

[14] THE COURT: Oh, you keep talking about that. That's the history of this thing as it was at the time I took my bite at it.

MR. SHAFER: No.

THE COURT: The amendments have already been made?

MR. SHAFER: No, Your Honor.

THE COURT: They were here before at the time I took my bite and wound up enjoining the enforcement of it, didn't I?

MR. SHAFER: No, Your Honor. After we had – they had made 92 amendments before you took your bite at the apple, after we spent the four days in an evidentiary hearing, but before you ruled they made 52 more amendments. They enacted those.

THE COURT: Oh.

* * *

[15] THE COURT: Well, what relief is it that you're seeking? When we have a trial in this matter or the alternative, just make my preliminary injunction a final injunction, enter final judgment, and permanently enjoin the ordinance as it existed at the time I acted and then ship this case on.

MR. SHAFER: Well, Your Honor, we would – we would ask the court to –

THE COURT: My injunction is it's enjoined from being enforced in the form and fashion in which the ordinance existed at the time I acted on the preliminary injunction. Why not make that the final order of this court and bring this case to a conclusion?

MR. SHAFER: Well, first of all, it really doesn't address any issue.

THE COURT: You're not asking for money damages, are you?

[16] MR. SHAFER: Not yet. I mean we may because there has now been –

THE COURT: Have you sued for money damages?

MR. SHAFER: Not yet.

THE COURT: When you keep saying not yet, are you anticipating an amendment, and assuming I'm going to grant it, but have you sued to this point for money damages?

MR. SHAFER: No, Your Honor.

THE COURT: Then the only relief sought in this matter is injunctive relief.

MR. SHAFER: That's right.

THE COURT: And I have granted preliminary injunction, injunctive relief, and as to the ordinance as it existed at the time I granted preliminary injunctive relief why shouldn't that order be made a permanent injunction and a final judgment –

MR. SHAFER: Well, –

THE COURT: – and end this matter and let the appeal from this matter be consolidated with the appeal, the interlocutory appeal from Judge Nixon?

MR. SHAFER: Well, Your Honor, because I don't think there would be anything to appeal, nor would I.

THE COURT: Well, you wouldn't be appealing because it's in your favor.

MR. SHAFER: Well, yes, Your Honor. But I don't [17] think they would appeal it either.

THE COURT: You don't know what they will do.

MR. SHAFER: Well, I don't, Your Honor.

THE COURT: You would have won the lawsuit.

MR. SHAFER: I would have won the lawsuit.

* * *

[19] MR. SHAFER: No, Your Honor, I believe not.

THE COURT: I'll hear you. Why shouldn't this matter come to a conclusion?

MR. YOUNG: Well, Judge, what strikes me is judicial efficiency. Now –

THE COURT: I tell you what the judicially efficient thing to do is to bring this case to a conclusion on the record as it was before this court and enter final judgment and if the Metropolitan Government wants to appeal, says it's aggrieved, then you would have your 30 days to file your notice of appeal. And then if there's going to be another controversy, you get your ordinance, get your ducks in a row, you have been nibbling at – when I say you, the defendant, the government has been nibbling at it, the judges in this courthouse do something, then the Metropolitan Government Legal Department gets busy to try to [20] patch that up. Y'all are like plumbers over there. With regard to this adult business, dirty bookstore thing, hootchy-kootchy show places, you all are like plumbers, making emergency calls. When the weather gets 20 degrees, broken pipes and pipes are freezing all over town. The efficient thing is to bring some finality to a litigation. And why shouldn't this litigation as the court took it on the record as it was before the court be made final?

MR. YOUNG: Because, Judge, the nature of this litigation is attacking a local ordinance which by definition is a living, breathing thing and can change.

Now, Judge, I understand your position on it being a moving target. However, if all the time and effort that you have spent reading the three-foot high –

THE COURT: It's three times that.

MR. YOUNG: Okay. Well, to waste all that knowledge that you have gained in reading all the pleadings and in your exhaustive and painstakingly detailed memorandum.

THE COURT: From which you had a right to take an interlocutory appeal.

MR. YOUNG: Well, we're going to amend the ordinance, take care of problems that you set forth in your memorandum, and then since the plaintiffs have been required to list all their issues, told us the couple of instances

[21] that we have to change, we'll change them and, Judge, we would like to come back before you on summary judgment. We don't think we need a trial in this case.

* * *

[22] MR. YOUNG: . . . But it doesn't make any sense to freeze the record until we've had a chance to implement the changes that we have enacted.

THE COURT: It may not make any sense to you, but I have spent ten minutes now articulating the sense it makes to me. There needs to be a winner and a loser in this case and get on with it, and then if there has to be another lawsuit with the ordinance as it's recast, then whoever is aggrieved can bring a new lawsuit.

MR. YOUNG: Well, Your Honor, I hear you. I understand you. I respectfully disagree. And –

THE COURT: Well, this is an instance where both sides disagree with the court, and that makes it pretty clear.

MR. SHAFER: Could I make a –

THE COURT: I thought I would have at least have one side go with me, but –

MR. SHAFER: Your Honor, you have never seen Mr. Young and I agree on anything.

THE COURT: Y'all are both in the same canoe now.

MR. SHAFER: Yes.

THE COURT: I'm not saying you're not going to succeed in turning it over or driving up on the rocks in the

[23] white water of some rapid that's just around the turn here, but right now y'all are paddling the canoe vigorously in rhythm. Strange as it may be. You may be embarrassed about being in the same canoe with the Metropolitan Government.

MR. SHAFER: You know, I'm not embarrassed. I mean I'm an officer of the court and I'm trying to do my duty and I'm trying to do my duty to my client. You know, you're right about what happened in 1989, but as I pointed out to you, you know, I was involved in that. My office handled that. And that's right, we ended it and it was over and done with. Well, they don't want to do that. And so now they keep coming.

THE COURT: You don't either.

MR. SHAFER: Pardon me?

THE COURT: You don't either.

MR. SHAFER: Well, –

THE COURT: I have offered you a chance to walk away as the winner by having judgment entered right here in this case, period.

MR. SHAFER: Well, –

THE COURT: Bam, you're the winner.

MR. SHAFER: And that's all well and good and I'll have an injunction, Your Honor. And to be very honest, you know, I don't even know procedurally how this would happen because under the injunction they haven't enacted a new [24] ordinance, they have an amendment to an ordinance, okay? So if you entered a final judgment now, it seems to me then what would happen is they amend the ordinance in late January, they still have to come back to you because the ordinance is enjoined. It doesn't matter if it's been a different permutation or a combination of the ordinance, you're still going to be stuck with whether or not to lift the preliminary injunction in a post judgment.

THE COURT: No, a permanent injunction. If I end this lawsuit, the preliminary injunction goes out the window and it becomes a permanent injunction.

MR. SHAFER: I agree, Your Honor.

THE COURT: Then what they could do is just enact an entirely new ordinance.

MR. SHAFER: Well, –

THE COURT: And clean it up. And then you can start attacking it.

MR. SHAFER: They could.

THE COURT: And why wouldn't that be an efficient clean-cut way to deal with it?

MR. SHAFER: Well, let me give you one example. You know, we have the issue of the distance requirement, the dancer buffer zone. And that is something that was decided on an evidentiary basis, you made a determination in the preliminary injunction motion that, you know, we were not [25] likely to prevail, the preliminary injunction was not – told to me it was not the trial on the merits as well under the –

THE COURT: It was what?

MR. SHAFER: It was not told to me that it was going to be the trial on the merits.

THE COURT: No, we don't anticipate it. I'm asking you now why it can't be treated as the trial on the merits, convert it to a permanent injunction, enter final judgment.

MR. SHAFER: Well, I hink because there are a number of legal issues that, A, we've not litigated at all that were involved in the ordinance that was – the amendments that occurred after this court heard the evidence but before it ruled, and the best example I can give you of that, Your Honor, and you were talking about my motion for sanctions, and it all dealt with this issue of what's a booth and how a booth is to be defined. And I can tell you, Your Honor, that was one of the issues that caused the Sexually-oriented Business License Board to split two to two.

* * *

[28] MR. YOUNG: Judge, we're not the moving target in this case. The reason why this case is moving in increments is because the plaintiffs started off keeping some of their issues in their back pocket and not hitting us with everything they got on on the front end. They hit us on the front end with lack of prompt judicial review. That's been resolved in front of Judge Nixon. Now it's up on appeal.

Then Judge Griffin says the plaintiffs shall file a supplemental motion for preliminary injunction in which all issues upon which the plaintiffs rely in this case shall be raised. That's the motion you decided.

So, the ordinance makes a few changes that will accomodate your concerns and now we're ready again. Do they have more motions in there or more issues to raise that they haven't shown us yet? We tweaked the ordinance, Your Honor, [29] and only as a result of the issues raised in this case. I mean let's call it what it is.

So the prolonging of the case and the fact that we keep amending the ordinance, what are they going to raise on summary judgment? What are they saving for trial? Okay? If they – I respectfully submit the plaintiffs should be charged with laying all of their issues on the table, we'll address them all in a row, you'll decide whether thumbs up or thumbs down, we'll go back and make the amendments and then we'll have a constitutional ordinance. It's not a question of if we can get a constitutional ordinance, it's a question of when. And you have already sunk a lot of blood, sweat and tears. Well, all the work that you have done in this case, Judge, up to this point, I submit, would just be wasted if this were to go – if you were to close the books and go somewhere else.

So I think the plaintiffs should have an obligation to raise all of their issues, let us address them with amendments, let you rule on them, and then we will have a constitutional ordinance some day.

* * *

[32] THE COURT: And at some point a lawsuit has to just cease being a moving target. It has to crystalize and lead to a final judgment, or otherwise it undermines the basic principles of our judicial system of predictability, stability and finality: The three great principles. And take this ordinance, this piece of legislation as it was at the time the court acted on it, make it a final judgment, anybody that's aggrieved can appeal it, and that much we know is resolved.

For instance, you have already got an appeal pending in this very matter.

* * *

[38] MR. YOUNG: Judge, may I offer a suggestion how the nibbling rule can be wiped out of this case?

THE COURT: Yes.

MR. YOUNG: Let us enact our amendments, let us file summary judgment motions with the understanding that all the issues the plaintiffs are going to raise that they can't keep any information in their back pocket waiting for trial, all the issues that they are going to be raising have to be raised on summary judgment on the ordinance that's in the process of being amended, then it seems to me, Your Honor, after summary judgment, which I submit is the way this case is going to get resolved, then we'll have a final order, we will have had all the issues raised that can be raised, no holding back in the back pockets to prolong [39] anything or surprise at trial, and we can't change our ordinance in this case any more after you have entered final judgment after they have shot all the arrows.

THE COURT: How do I know while I'm working on that you all won't conjure up some more amendments? You did it this time. I don't have any assurance. You can't bind this legislative body.

MR. YOUNG: That's true.

* * *

[40] MR. YOUNG: Well, Judge, I can't promise you what the council will or will not do. But if you have got a summary judgment motion pending, the record is closed

as of the day you close the record for the summary judgment motion. And if you grant it, the case is over. Which is a different scenario from back when we were under a preliminary injunction motion having a hearing and then awaiting the ruling on that.

So that's how I would distinguish those two scenarios. The point is is to get all – let's air all the dirty laundry, let's get all the issues on the table so we can address them.

THE COURT: Well, I'm not going to fool with any summary judgment motion. If this thing goes forward, I tell [41] you, I might consider this: Granting one further round of amendments as to the ordinance as it then exists, and permit any discovery that's reasonably necessary, and then try this case. I'm not going to whack at it on summary judgment, wind up with some issues unresolved, have to have a trial. Listen, I don't come to town on the last load of pumpkins every day. And I can see what's heading down the road. If I subscribe to something you're suggesting, I would say, Yes, I'll give you one set of amendments, shoot everything you have got in your powder pouch, and be done with it, make all your attacks, there will be no further amendments in this case, take your discovery, and we'll try the case fully and make a full record. I'm not going to hack at it and write again on a round of dispositive motions, I can tell you that flat out.

MR. SHAFER: I have got no objection to that, Your Honor.

* * *

[42] THE COURT: Just say, Judge, enter a final judgment.

MR. YOUNG: Well, then I'm not going to know what posture I'm in after we enact some amendments.

THE COURT: You'll be in the posture of having a new lawsuit, that's what you'll be in the posture of.

MR. YOUNG: Well, if we enact our amendments and then start enforcing it, are we bound by your injunction?

THE COURT: I enjoined the injunction at the time it existed at the time I ruled on it. That's all I've enjoined is you just enacting an entirely new ordinance. I don't think you would be enjoined from enacting a new – I didn't preclude you from enacting a new ordinance. I enjoined you from enforcing this ordinance as it existed at the time I ruled on it.

MR. YOUNG: Yes, sir. Well, at the risk of repeating myself, Judge, I think the number of issues have shrunken in the legal issues and that a trial is a major expense of everybody's time and that I just think it's more efficient and it lends itself to the kind of issues that are present in the case to be resolved on summary judgment.

THE COURT: Well, you're wrong about that, because [43] one thing, if it goes up on summary judgment, the Court of Appeals could always say, Well, this or this or this. It might be different if we had the full record, some material fact that's in dispute, if you send up the full record, then they have to deal with it. It's not up there in the posture of passing on whether the summary judgment was appropriate or not. They have got the full definitive evidentiary record and that's the advantage of sending a trial record up as opposed to a summary judgment record.

* * *

## UNITED STATES DISTRICT COURT
## DISTRICT OF CONNECTICUT

| | |
|---|---|
| **SIDEPOCKETS, INC., d/b/a KEEPERS, a Connecticut Corporation,**<br>**Plaintiff,**<br>**v.**<br>**CITY OF MILFORD, CONNECTICUT, a Municipal Corporation,**<br>**Defendant.** | **Case No. 3:03-cv-02134-AWT**<br>**Hon. Alvin W. Thompson**<br>**NOTICE OF DEPOSITION OF REPRESENTATIVES OF THE CITY OF MILFORD, CONNECTICUT, PURSUANT TO FED.R.CIV.P RULE 30(b)(6)**<br>(Filed February 17, 2005) |

DANIEL A. SILVER,
fed # ct 08183
Law Office of Daniel A. Silver
Counsel for Plaintiff
One Liberty Square
New Britain, Connecticut
06050-0698
860-225-3518

BRADLEY J. SHAFER,
fed # ct 25669
Shafer & Associates, P.C.
Co-Counsel for Plaintiff
3800 Capital City Boulevard,
Suite 2
Lansing, Michigan
48906-2110
517-886-6560
*Admitted *pro hac vice*

TO:

Scott D. Bergthold
6830 McCutcheon Road
Chattanooga, Tennessee
37421

James P. Mooney
2452 Black Rock Turnpike
Fairfield, Connecticut
06825

NOW COMES the Plaintiff, Sidepockets, Inc., by and through its attorneys, and pursuant to Fed.R.Civ.P. Rule 30(b)(6), hereby gives notice of the deposition of the City of Milford, Connecticut. The deposition(s) shall commence on Wednesday, December 22, 2004, at 9:00 a.m., at the law office of Daniel Silver, located at One Liberty Square, New Britain, Connecticut, 06050, and shall continue from day-to-day until completed.

Defendant is to designate and produce for deposition one or more officers, directors, or managing agents, or other persons who consent to testify on behalf of the City of Milford, Connecticut, who possess the knowledge to testify on its behalf in regard to the following matters:

1. The initial proposal of and subsequent drafting, consideration, revisions, adoption, and enactment by the City of Milford, Connecticut ("the City"), of Chapter 2.3 of the Code of Ordinances of the City of Milford ("Chapter 2.3").
2. The initial proposal of and subsequent drafting, consideration, revisions, adoption, and enactment of any amendments by the City to Chapter 2.3.
3. Any and all documents[1] submitted to the City, and/or to the Board of Aldermen, regarding, concerning, related to, or in furtherance of the initial proposal of and subsequent drafting, consideration, revisions, adoption, and enactment by the City of Chapter 2.3.
4. Any and all documents submitted to the City and/or to the Board of Aldermen regarding, concerning, related to,

---

[1] The term "document" as used herein means any memorandum, report, study, contract, agreement, chart, graph, index, data sheet, data processing card or tape, note, notebook, diary, correspondence, entry, telegrams, letter, ledger, advertisement, brochure, circular, tape, record, bulletin, paper, book, pamphlet, account, receipt, invoice, photograph, report, analysis, calculation, and any other written, typewritten, handwritten or other graphic matter, any electronic or other recording of any kind or nature, any mechanical or electronic sound recordings or transcripts thereof, however produced or reproduced, and all copies of facsimiles of such documents by whatever means made.

or in furtherance of the initial proposal of and subsequent drafting, consideration, revisions, adoption, and enactment of any amendments to Chapter 2.3.

5. Any and all documents relied upon by the City and/or by the Board of Aldermen regarding, concerning, related to, or in furtherance of the initial proposal of and subsequent drafting, consideration, revisions, adoption, and enactment by the City of Chapter 2.3.

6. Any and all documents relied upon by the City and/or the Board of Aldermen regarding, concerning, related to, or in furtherance of the initial proposal of and subsequent drafting, consideration, revisions, adoption, and enactment of any amendments to Chapter 2.3.

7. Each and every governmental interest meant to be furthered by the provisions of Chapter 2.3.

8. Each and every governmental interest meant to be furthered by any amendments to Chapter 2.3.

9. The reason and/or purpose for enacting each provision of Chapter 2.3.

10. The reason and/or for enacting each amendment to Chapter 2.3.

11. The manner by which the provisions of Chapter 2.3 further the governmental interests described in requests 7 and 8 above.

12. The manner by which any amendments to Chapter 2.3 further the governmental interests described in requests 7 and 8 above.

13. The method or manner by which the documents as referenced in requests 3 and 5 above establish that the provisions of Chapter 2.3 were meant to address the governmental interests as set forth in request 7 above.

14. The method or manner by which the documents as referenced in requests 4 and 6 above establish that any amendments to Chapter 2.3 were meant to address the governmental interests as set forth in request 8 above.

15. The method or manner by which the documents as referenced in requests 3 and 5 above establish that the provisions of Chapter 2.3 will in fact further the governmental interests as referenced in request 7 above.

16. The method or manner by which the documents as referenced in requests 4 and 6 above establish that any amendments to Chapter 2.3 will in fact further the governmental interests as referenced in request 8 above.

17. The definition and interpretation of any provisions of Chapter 2.3 which are not specifically defined in that ordinance.

18. The definition and interpretation of any provisions in any amendments to Chapter 2.3 which are not specifically defined in those amendments.

19. The "judicial opinions," "media reports," "land use studies," "crime impact reports," "cases," "judicial findings," "reports," "statistics," and "studies" of other governmental entities regarding the effects of "Adult-Oriented Establishments," "Adult Uses," and/or "Sexually Oriented Businesses" (as those terms are generally defined and/or used in Chapter 2.3) as set forth in the Policy Statement, §2.3-1(1)-(7), of Chapter 2.3.

20. What effect, if any, that the initial licensing and regulatory provisions as set forth in the Chapter 2.3 at the time it was first enacted, which relate to "Adult-Oriented Establishments" and/or "Sexually Oriented Businesses" (as those terms are generally

defined and/or used in Chapter 2.3), have had within the City on any perceived "secondary effects," "adverse secondary effects," and/or "negative secondary effects" (as those terms are defined and/or used in the Policy Statement of Chapter 2.3) engendered by such businesses.

21. What effect, if any, that the adult business zoning provisions in the City of Milford have had on any perceived "secondary effects," "adverse secondary effects," and/or "negative secondary effects" (as those terms are defined and/or used in the Policy Statement of Chapter 2.3) engendered by such businesses.

22. The judicial opinions, media reports, land use studies, crime impact reports, cases, judicial findings, reports, statistics, and studies referenced in the Policy Statement of Chapter 2.3, and how the same relate to:

    a. The necessity for the various provisions of Chapter 2.3 and any amendments thereto; and

    b. How the provisions of Chapter 2.3 and any amendments thereto further any of the governmental interests referenced in requests 7 and 8 above.

23. The basis or bases for each of the statements in the Policy Statement of Chapter 2.3, as set forth in §2.3-1(1)-(7).

24. Any and all documents and information utilized, relied upon, or referenced in preparing the Policy Statement of Chapter 2.3.

25. The method, manner, reason, or basis (or bases) as to why the Policy Statement supports the enactment of each and every provision of Chapter 2.3.

26. The method, manner, reason, or basis (or bases) as to why the Policy Statement supports the enactment of any amendments to the provisions of Chapter 2.3.

27. Any and all documents prepared for the enforcement or interpretation of Chapter 2.3.
28. Any and all documents prepared for the enforcement or interpretation of any amendments to Chapter 2.3.
29. The identities of each and every place of "Adult-Oriented Establishment," and/or "Sexually Oriented Business" (as those phrases are defined and/or used in Chapter 2.3) that has been located within the City for the past fifteen (15) years.
30. The creation, retainage, use, and contents of any and all documents requested in Plaintiff's First Request for Production of Documents to Defendant.

Dated: December 3, 2004. Respectfully submitted,

/s/ Bradley J. Shafer

BRADLEY J. SHAFER,
Fed # Ct 25669
Shafer & Associates, P.C.
Co-Counsel for Plaintiff
3800 Capital City Boulevard,
Suite 2
Lansing, Michigan
48906-2110
517-886-6560 – Telephone
*Admitted *pro hac vice*

DANIEL A. SILVER,
Fed # Ct 08183
Law Office of Daniel A. Silver
Counsel for Plaintiff
One Liberty Square
New Britain, Connecticut
06050-0698
860-225-3518 – Telephone

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| SIDEPOCKETS, INC.<br>d/b/a KEEPERS<br>Plaintiff<br>vs.<br>THE CITY OF MILFORD,<br>CONNECTICUT<br>Defendant | : | No. 3:03CV2134(AWT)<br>HARTFORD,<br>CONNECTICUT<br>OCTOBER 30, 2006 |

TELEPHONIC STATUS CONFERENCE

BEFORE:

**HON. ALVIN W. THOMPSON U.S.D.J.**

* * *

[3] 4:02 P.M.

THE COURT: Good afternoon.

* * *

I wanted to talk with you all about the motion for clarification or, in the alternative, to alter or amend.

* * *

[4] THE COURT: Well, I think – thank you. I feel better. But it also seems to me that there is a layer of complexity to these kinds of cases.

I went through some of the Supreme Court decisions, and I looked at some of the qualifying language in some of the statements by the court. And it appears to me – and I'll just give you an example.

In Renton, the court said that Renton was entitled to the rely on the experiences of other cities and did not need to conduct new studies. I think I'm quoting, "so long as whatever evidence the City relies on is reasonably believed to be relevant to the problem that the City addresses."

It seems to me that implicit in that statement is that someone attacking a city's ordinance needs to be given an opportunity to probe as to whether the evidence the City relies on is reasonably believed to be relevant to the problem that the City addresses. And there are similar types of statements at other places in Renton. Also in Alameda Books and in City of Erie.

Having concluded that there are areas where a [5] plaintiff is entitled to probe through discovery, I then looked for some cases that gave examples of where you had a conflict between that right to probe and the two issues that were raised by the defendant here; namely, attorney-client privilege and legislative immunity. I really didn't find anything that I thought was really helpful to me, and I'm left with I guess conclusions at a conceptual level, which is that the plaintiff has the right to probe in order to try to show that reasons that the Supreme Court would say are reasons why an ordinance would not pass muster are present in a particular case, but it seems to me there are limitations in terms of the ability to probe that are based on Doctrine of Legislative Immunity and attorney-client privilege.

That's as far as I've gotten in my analysis.

* * *

[8] MR. BERGTHOLD: The ordinance on the text of it states that judicial decisions upon which these regulations are based, and the decision in the middle of the Renton decision and the City of Erie decision is Barnes vs. Glen Theatre, which is a 1990 Supreme Court decision. And I mention it as relevant because in that case the state of Indiana, which adopted immunity statute, keeps no legislator record.

So what we were arguing in our first argument beginning on page 2 of our memorandum in support of the motion is that basically when you have on-point judicial decisions that have upheld these regulations as advancing or serving a substantial government interest and the Supreme Court has specifically held that municipalities can rely on those other jurisdictions' experiences as recorded in these judicial decisions, that there's no need [9] to re-debate or open up discovery for the secondary effects issue.

And our authority for that was cited in our opening memorandum, and we recently submitted two cases to the Court that we think are on point. One is the Deja Vu of Nashville case that Mr. Shafer was involved in from the Sixth Circuit about two weeks ago that said –

THE COURT: I read that one.

* * *

[19] THE COURT: And what about there's another determination that needs to be made – and I'm going to [20] let Mr. Shafer talk, he's been very patient. But what you didn't address in your comment was the language "reasonably believed to be relevant." And that's where I was really focused.

* * *

[21] THE COURT: And I guess that was the kind of dynamic that I was concerned about when I said what I was focusing on was "reasonably believed."

MR. SHAFER: Exactly, Your Honor. And Mr. Bergthold is correct. He's given us a thousand pages – somewhere around there. But we're entitled to examine what that is, what it purports to be, what they're asserting those documents were and how it fits into this analysis. The Federal Rules of Civil Procedure –

THE COURT: We won't go on a discourse on that. I agree with you there.

* * *

[24] MR. SHAFER: Now, let me deal with a couple of other issues, Your Honor.

The Deja Vu [Nashville] case – and I pointed out this in my most recent pleading to Your Honor – that is also my case. And what I can tell Your Honor, and I assume you can get this stuff on Pacer, I believe –

THE COURT: For now why don't we not talk about Deja Vu.

* * *

[25] THE COURT: Okay. Why don't I say what I want to say and then you can elaborate on that point, if you want.

Having read these cases, thought about the dynamic here, and having listened to the arguments of counsel, it seems to me that the plaintiff ought to be allowed to take discovery. And I can see there might be some practical issues that arise during the course of that, but I think the right thing to do is to have you all proceed and then have me deal with any issues that present [26] themselves.

* * *

THE COURT: Where I was coming from was the example that – the literal language from Renton was the example I was using. The evidence the City relies on is [27] reasonably believed to be relevant to the problem the City addresses. If there's no – to take the example that was given, if it turns out that the City is sitting there knowing it has no problems and what is really motivating people is not the secondary effects or concern about secondary effects which may result, but sort of, say, religious beliefs, then I would think that that ordinance would not satisfy the requirements. But I'm not purporting to give you the whole road map – the whole landscape, rather, of what would be permissible grounds for discovery. I think what would be permissible grounds for discovery would be points that in Supreme Court cases or Appellate Court cases have been acknowledged as ones where an ordinance would fail.

* * *

[30] THE COURT: Maybe what we should do – well, just so we're clear, I believe we have the Motion for Clarification. I'm granting the Motion for Clarification. I'm making it clear that what I was saying was that the plaintiff cannot go into matters protected by attorney-client privilege or legislative immunity. And I understand that plaintiff isn't intending to do that.

* * *

## UNITED STATES DISTRICT COURT
## DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| SIDEPOCKETS, INC., d/b/a KEEPERS, | : | No. 3:03CV2134(AWT) |
| Plaintiff, | : | |
| v. | : | |
| CITY OF MILFORD, | : | |
| Defendant. | : | |

## ORDER RE MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE TO ALTER OR AMEND AND RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

(Filed October 30, 2006)

For the reasons set forth during the telephonic hearing held on the record today, the Motion for Clarification or in the Alternative to Alter or Amend (Doc. No. 66) was GRANTED. The plaintiff was granted leave to proceed with discovery subject to limitations imposed by legislative immunity and the attorney-client privilege.

As discussed during the same hearing, the Plaintiff's Motion for Summary Judgment (Doc. No. 33) and the Defendant's Motion for Summary Judgment (Doc. No. 40) were DENIED without prejudice to renewal after the completion of discovery.

It is so ordered.

Dated this 30th day of October 2006 at Hartford, Connecticut.

/s/AWT
Alvin W. Thompson
United States District Judge

From: David Bugher
To: DHEID
Subject: Adult businesses

Well, I have a depressing statistic. It's good in one way and bad another. Since incorporation, the City has amassed 15,415 reported criminal incidences. Get this, 25% occurred along a 300 acre strip of Pacific Highway and South Tacoma Way. How many incidences were within 1,000 feet of all adult entertainment establishments? 400! A lousy 400! That's only 2.6% of the total! Jack Burns will love this.

What bothers me is that many communities used the secondary effects of adult businesses (i..e. crime) to justify stricter codes. This aspect or element just doesn't seem to be present. Sure, there is a great amount of crime in the area, but it is associated with I-5 and the low income neighborhoods along I-5.

I have tried working this issue from a number of different angles. I have tried to focus the types of criminal incidences (rape, burglary, vandalism) to see if such a corollary existed. It doesn't. I know this isn't what people want to hear, however, that is what is reported.

Dave

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA d/b/a Mardi Gras, 6420 ROSWELL ROAD, INC., d/b/a Flashers, HARRY FREESE, individually and as licensee for Flashers, FANNIES, INC. d/b/a Fannies, and WILLIAM H. PARKS, JR., individually and as licensee of Fannies,

Plaintiffs,

v.

FULTON COUNTY, GEORGIA, et al.,

Defendants.

CIVIL ACTION

NO. 1:01-CV-3109-RLV

---

CEEDA ENTERPRISES, INC. d/b/a Riley's Restaurant and Lounge,

Plaintiff,

v.

FULTON COUNTY, GEORGIA, et al.,

Defendants.

CIVIL ACTION

NO. 1:01-CV-3696-RLV

## **ORDER**

(Filed Apr. 7, 2004)

These are actions pursuant to 42 U.S.C. § 1983, in which the plaintiffs challenge the constitutionality of a Fulton County ordinance dealing with adult entertainment establishments. Pending before the court are motions by defendant Fulton County, Georgia, for summary judgment [Doc. No. 40 in Civil Action No. 1:01-CV-3109-RLV; Doc. No. 16 in Civil Action No. 1:01-CV-3696-RLV].

* * *

The plaintiffs allege that in February or March 2001, soon after *Flanigan's Enterprises of Georgia, Inc. v. Fulton County, Georgia*, 242 F.3d 976 (11th Cir. 2001) ("*Flanigan's I*") was decided, the county attorney's office assembled personnel from the police department and the tax commissioner's office to discuss drafting a new adult business ordinance. The plaintiffs assert that Overtis Hicks Brantley of the county attorney's office instructed police chief George Coleman to "provide certain statistics" and other information about adult businesses for the purpose of adopting a new law. At some point, the board was "leaning toward . . . prohibiting the sale of alcohol in adult entertainment establishments." The plaintiffs contend that, although Chief Coleman requested that adult businesses be studied and patrolled for the purpose of rewriting the adult entertainment ordinances, he did not study whether non-adult entertainment venues were causing adverse secondary effects. Accordingly, the county report does not reveal whether adult businesses selling alcohol create more or less crime or blight than non-adult entertainment bars.

The defendant asserts that, prior to the enactment of the challenged ordinance, counsel for the plaintiffs were given notice of the public hearing and had an opportunity to be heard at the hearing. The plaintiffs assert that the notice given did not comport with the requirements of the due process provisions of the Georgia and United States Constitutions. The hearing on the proposed ordinance was held on July 18, 2001. The defendant allocated itself 30 minutes for its presentation, while the plaintiffs were given 15 minutes for each attorney. Other speakers were entitled to two minutes each.

* * *

At the July 18 hearing, attorneys representing the clubs and other affected venues spoke in opposition to the proposed ordinance. It was determined that the record would remain open until August 8 and that the vote as to the proposed ordinance would occur on August 15. The plaintiffs assert that on July 26, they served an open records request on the Fulton County Police Department seeking "a record of every response by a patrol car to any call" for police assistance from 16 locations between January 1, 1998, through June 30, 2001. On August 1, June D. Green of the Fulton County Attorney's Office responded to the request by stating that documents concerning "police calls are maintained in the Emergency Communications Department and not by the Police Department." She further stated, "[M]ost of the documents concerning the proposed adult entertainment ordinance are contained in the Report on Adult Entertainment Businesses which you have a copy of and any remaining documents are in the County Attorney's Office and can be made available to you tomorrow." The plaintiffs contend that on August 2, they wrote to Alfred E. Moore of the

Emergency Communications Department seeking the calls for police service. An identical open records request was served on the police department at that time.

* * *

The plaintiffs assert that, on August 9, 2001, on day after the period for submitting evidence in opposition to the adult ordinance had closed, Ms. Green delivered to the plaintiffs' attorneys a report dated March 2001 and entitled "Adult and Non-Adult Entertainment Establishments Statistical Analysis from 1/1/98 to 12/31/00." This report indicates that, "as a result" of the decision in *Flanigan's I*, the police department was tasked again to conduct an analysis "on the secondary effects of alcoholic [sic] consumption in adult entertainment establishments located in Fulton County." The data reviewed was obtained from crime analysis reports from January 1, 1998, to December 31, 2000. The Fulton County police department completed an analysis of calls for service and crime incident reports of six adult establishments that served alcoholic beverages compared to seven non-adult establishments that served alcoholic beverages.[5] The study concluded that there were a lower number of calls for service to those adult establishments than there were to the non-adult establishments. The study concluded that adult establishments that serve alcohol "did not have a significant impact on the police department as it relates to an increase in calls for police service, nor an increase in crime as a secondary affect [sic]." There was "no statistical correlation" between the adult clubs and calls for police service. Moreover, the study indicated that non-adult establishments that served alcoholic beverages had a higher rate of calls for service than did the adult establishments. On August 9, the clubs tendered a copy of the study to Ms. Brantley and requested that she submit it to the board before allowing a vote on the alcohol ordinance. The plaintiffs also objected to the study being withheld from them. The ordinance was enacted on August 15.

---

[5] The six adult establishments were Mardi Gras, Flashers, Coronet Club, Fannie's, Riley's, and Babes. The seven non-adult establishments were Frankies, American Pie, Club International, Club 20 Grand, The Frozen Palace, The Ritz, and Crowes Nest.

The defendant has advanced several reasons as to why it is entitled to summary judgment.

* * *

After carefully reviewing the record, the court concludes that the defendant has failed to establish the second prong of the test – that the ordinance furthers an important government interest. In order to meet its burden, the defendant must have "some factual basis that [adult] entertainment in establishments serving alcoholic beverages results in increased criminal activity and other undesirable community conditions." *Flanigan's I*, 242 F.3d at 985. The Fulton County police department's March 2001 report indicates that it completed an analysis of police calls after the Eleventh Circuit rendered its decision in *Flanigan's I*. The police department concluded:

> A preview of the statistical data concluded a lower number in calls for service to adult entertainment establishments who served alcoholic beverages than those non-adult entertainment establishments who served alcoholic beverages. The review also captured no significant increase in part one crimes in adult entertainment establishment [sic] that serves alcoholic beverages. In reviewing the types of calls for service, the police

responded to 998 calls for service to adult entertainment establishment [sic] who served alcoholic beverages and 2,109 calls for service to non-adult entertainment establishment [sic] who served alcoholic beverages. The tri-annual statistical data of general calls for service was 5,556,255. The most frequent calls for service for adult entertainment establishments who served alcoholic beverages are as follows:

Information for Officer – 16%, Business Checks – 15%, Investigate Suspicious Person – 14%, ADT Alarm – 11%, Other Type of Incidents – 43%, Part I Crimes 1% (Burglary 4, Robbery 5 and Rape 1).

The reviewed data suggests that adult entertainment establishment [sic] who served alcoholic beverages did not have a significant impact on the police department as it relates to an increase in calls for police service, nor an increase in crime as a secondary affect [sic]. Based on this statistical analysis of calls for police service and reported crimes at adult entertainment establishments that serve alcoholic beverages; no statistical correlation indicated an increase in calls for service or reported crimes at these six establishments. However, the statistical data indicated that non-adult entertainment establishments who served alcoholic beverages had a higher rate of calls for service than adult entertainment establishments who served alcoholic beverages. The statistics from January 1, 1995 to May 31, 1997 versus the statistics from January 1, 1998 to December 31, 2000 indicated that the Fulton County Police Department increased calls for police service by 27.1% to adult entertainment establishment who served alcoholic beverages and 29.7% to non-adult entertainment establishments who

> served alcoholic beverages. The data does not address other secondary factors that may influence the calls for services at either type of establishment.

* * *

The most probative evidence regarding the secondary effects of adult entertainment establishments is found in the three-year statistical analysis of adult and non-adult entertainment establishments performed by the Fulton County police department. The court is somewhat troubled by the fact that it appears that this report was withheld from the plaintiffs until less than one week prior to the date on which the vote on the ordinance was scheduled. It appears that the report was not considered by the board at the meeting on July 18, 2001. The report indicates that, over the course of three calendar years prior to the enactment of the ordinance, there were more problems associated with non-adult entertainment establishments than with adult entertainment establishments.

* * *

As in *Flanigan's I*, the police study found greater reported crime connected with establishments that served alcohol but did not feature adult entertainment. The court concludes that it was unreasonable to ignore the most relevant local study in favor of a less comprehensive study and foreign studies. Because the most comprehensive analysis of the secondary effects of alcohol consumption in adult entertainment establishments in Fulton County indicated that there were more problems in non-adult entertainment establishments that serve alcohol than in the adult establishments, the court concludes that the defendant has not established that the ordinance furthers an important government interest. Accordingly, the court will DENY the defendant's motions for summary judgment. The court need not address the plaintiffs' other arguments as to why the ordinance is unconstitutional.

For the foregoing reasons, the defendant's motion for summary judgment [Doc. No. 40] is DENIED as to plaintiff Flanigan's Enterprises, Inc., *et al.* The defendant's motion for summary judgment [Doc. No. 16] is also DENIED as to plaintiff Ceeda Enterprises, Inc.

SO ORDERED, this 7th day of April, 2004.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

LACORTE, BUNDY, VARADY & KINSELLA
989 Bonnel Court
Union, New Jersey 07083
(908) 810-0500
Attorneys for Defendant, City of Elizabeth

| | |
|---|---|
| D. RUSSO, INC., a New Jersey corporation, doing business as HOTT 22,<br>Plaintiff,<br>v.<br>TOWNSHIP OF UNION, NEW JERSEY, a New Jersey Corporation,<br>Defendant. | SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY<br>DOCKET NO. UNN-L-2313-06<br>CIVIL ACTION<br>**ORDER**<br>(Filed Sep. 19, 2006) |

**THIS MATTER** having been presented to the Court on September 8, 2006, the return date for an order to show cause, Vincent S. Verdiramo, Esq. of the law firm of Verdiramo & Verdiramo, PA, and Daniel R. Aaronson, Esq., of the law firm of Benjamin & Aaronson, PA, appearing on behalf of the plaintiff, and Robert F. Varady, Esq. of the law firm of La Corte, Bundy, Varady & Kinsella, attorneys for the defendant, Township of Union, New Jersey, the Court having considered the papers submitted by counsel, the arguments made by counsel at the September 8, 2006 hearing and for good cause shown;

**IT IS ON THIS 19th DAY OF SEPTEMBER, 2006;**

1. **ORDERED,** that limited discovery will be conducted in regard to the issue of what information the Township Committee of the Township of Union considered in regard to the secondary effects of sexually oriented

businesses prior to their passing of Ordinance No. 4942 on April 11, 2006; and it is further

2. **ORDERED,** that any party who wishes to serve written discovery demands shall do so upon the other parties on or before October 1, 2006. Said written discovery demands shall be answered by the party receiving the same on or before October 20, 2006; and it is further

3. **ORDERED,** that depositions of any parties or witnesses in regard to the aforementioned issue shall take place on or before December 1, 2006; and it is further

4. **ORDERED,** that a hearing in regard to the issue of what information and/or evidence the Township Committee of the Township of Union considered in regard to the secondary effects of sexually oriented business prior to the passing of Ordinance No. 4942 shall take place on December 11 and 12, 2006 before the Honorable Katherine Dupuis, J.S.C. at 9:00 a.m.; and it is further

5. **ORDERED,** that Count XVIII of plaintiff's amended complaint alleging that the Town failed to comply with the Open Public Meetings Act is hereby dismissed with prejudice; and it is further

6. **ORDERED,** that the temporary restraints and the terms of said restraints as set forth in Paragraphs 1, 2, 3 and 4 of an order entered by the Honorable Walter R. Barisonek on July 10, 2006 shall remain in effect; and it is further

7. **ORDERED,** that a copy of the within Order be served upon all parties within 7 days of the date this Order.

/s/ Katherine R. Dupuis
HONORABLE KATHERINE
DUPUIS, J.S.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

High Five Investments, LLC,
and Shannon Video, Inc., d/b/a
Entice Adult Superstore, d/b/a
Entice Movies and Novelties,

Plaintiffs,

v.

Floyd County, Georgia,

Defendant.

CIVIL ACTION FILE
NO. 4:06-CV-0190-HLM

## ORDER

(Filed Jan. 10, 2007)

This is a civil rights action in which Plaintiffs claim that an ordinance enacted by Defendant restricting the location of adult entertainment venues violates Plaintiffs' First Amendment rights. The case is before the Court on Defendant's Motion for Protective Order [26] and Defendant's Renewed Motion for Protective Order [42].

### I. Background

On August 17, 2006, Plaintiffs filed this lawsuit. On November 20, 2006, Plaintiffs served deposition notices for John Mayes, Jerry Jennings, Chuck Hufstetler, Garry Fricks, and Tom Bennett, all of whom were Floyd County Commissioners.

On December 5, 2006, Defendant filed a Motion for Protective Order as to the deposition notices served on Commissioners Mayes, Jennings, Hufstetler, Fricks, and

Bennett. Defendant argued that the deposition notices sought testimony concerning (1) whether the Commissioners enacted the ordinance at issue because the Commissioners disagreed with Plaintiffs' sexually explicit message, and (2) the extent to which the Commissioners reviewed the voluminous studies and case law on which Defendant reportedly relied in enacting the ordinance. Defendant argued that those two areas of inquiry were irrelevant to this case because: (1) an alleged illicit motive does not render an otherwise constitutional law infirm; and (2) local government officials are entitled to legislative immunity from depositions. Defendant also contended that the deposition notices failed to comply with the Federal Rules of Civil Procedure.

On December 22, 2006, Plaintiffs responded to Defendant's Motion for Protective Order by filing a notice of withdrawal of the deposition notices to Commissioners Bennett, Fricks, Hufstetler, Jennings, and Mayes. In lieu of those deposition notices, Plaintiffs served a notice of deposition on Defendant pursuant to Federal Rule of Civil Procedure 30(b)(6). The Rule 30(b)(6) deposition notice demands that Defendant produce a designated agent for deposition on January 17, 2007, at 1:00 p.m., and further provides:

> Such designated agent(s) will be prepared to testify with regard to the ordinance's enactment process, each and every governmental interest meant to be furthered by the provisions of Floyd County Ordinance 2006-002A, how such interests are furthered by the regulations, and the origin, timing, and authenticity of all materials the County relied upon for enactment of said ordinance.

(Docket Entry No. 37 at 1-2.)

On January 9, 2007, Defendant filed a Renewed Motion for Protective Order pertaining to the Rule 30(b)(6) deposition notice. Defendant argues that Plaintiffs' Rule 30(b)(6) deposition notice intends to conduct the same allegedly improper and irrelevant inquiries as anticipated by Plaintiffs' original deposition notices to the individual Commissioners. Defendant argues that the enactment process for the ordinance is a matter of public record, and that this proposed area of inquiry is irrelevant. Defendant also contends that the ordinance itself states the governmental interests "meant to be furthered" by the ordinance, and that the only other way to determine what the Commissioners meant in enacting the ordinance is to interview the Commissioners to inquire about their legislative motive, which is an improper area of inquiry. Defendant further argues that the topic of "how such interests are furthered by the regulations" clearly asks for legal analysis pertaining to the substantial government interest, and that this question is a matter of law, not of fact. Finally, Defendant contends that the topic concerning the "origin, timing and authenticity of all materials the County relied upon for the enactment of said Ordinance" is irrelevant to the constitutionality of the ordinance. Because the Court has concluded that the Renewed Motion for Protective Order is due to be denied, and because the deposition noticed is scheduled to occur within less than one week and will require Defendant to prepare a witness to testify on the issues contained in the Rule 30(b)(6) notice, the Court will not require Plaintiffs to file a response to the Motion.

## II. Discussion

Federal Rule of Civil Procedure 26(b)(1) governs the scope of discovery, and provides, in relevant part:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). Federal Rule of Civil Procedure 26(c) states, in relevant part:

> Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Fed. R. Civ. P. 26(c). Keeping those rules in mind, the Court addresses Defendant's contentions.

First, the Court cannot find that an inquiry concerning "the ordinance's enactment process" is irrelevant because the minutes of the public meetings purport to reveal that process. This inquiry is relevant to Plaintiffs' claims and to this action.

Second, the Court finds that the area of inquiry concerning the interests "meant to be furthered" by the ordinance may not impermissibly seek the mental processes or intentions of the individual Commissioners, or otherwise seek information irrelevant to Plaintiffs' constitutional claims. By including this area of inquiry, Plaintiff may seek information that is pertinent to the issues that the Court must resolve in connection with a summary judgment motion.

Third, the Court cannot, and will not, preclude Plaintiffs from inquiring as to how Defendant believes "such interests are furthered by the regulations" just because Defendant believes that this inquiry is a matter of law, not fact. Indeed, information on this issue is relevant to Plaintiffs' claims, and the Court will not preclude Plaintiffs from obtaining that information.

Finally, contrary to Defendant's arguments, Plaintiffs are entitled to inquire concerning the "origin, timing and authenticity of all materials relied upon for the enactment of said Ordinance," if only to ensure that those materials, many of which Defendant submitted to the Court, are authentic. This information also is relevant to Plaintiffs' constitutional claims, and the Court will not preclude Plaintiffs from obtaining the information.

In sum, the Court concludes that the information Plaintiffs seek in their Rule 30(b)(6) deposition notice is relevant for the reasons set forth above and in accordance with the Court's Order, and is within the scope of discovery as set forth in Rule 26(b)(1). The Court therefore denies Defendant's Renewed Motion for Protective Order. The Rule 30(b)(6) deposition scheduled for Wednesday, January 17, 2007, may proceed as noticed.

## III. Conclusion

ACCORDINGLY, the Court **DENIES AS MOOT** Defendant's Motion for Protective Order [26], and **DENIES** Defendant's Renewed Motion for Protective Order [42].

IT IS SO ORDERED, this the 10th day of January, 2007.

/s/ Harold L. Murphy
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

| | | |
|---|---|---|
| RELIABLE CONSULTANTS,<br>INC. d/b/a DREAMER'S, | :<br>: | Case No. 4:02-CV-0458-Y<br>(Judge Means) |
| Plaintiff-Intervenor, | :<br>: | |
| v. | : | |
| CITY OF KENNEDALE,<br>TEXAS, | :<br>:<br>: | |
| Defendant. | : | |

---

## PLAINTIFF-INTERVENOR RELIABLE CONSULTANTS, INC. d/b/a DREAMER'S' BRIEF IN SUPPORT OF MOTION IN LIMINE

(Filed Jun. 18, 2004)

---

H. LOUIS SIRKIN
(Ohio Bar No. 0024573)
JENNIFER M. KINSLEY
(Ohio Bar No. 0071629)
SIRKIN, PINALES &
SCHWARTZ LLP
105 West Fourth Street,
Suite 920
Cincinnati, Ohio 45202
Telephone (513) 721-4876
Telecopier (513) 721-0876

– and –

GARY POLOZOLA
111 N. Houston Street,
Suite 212
Fort Worth, Texas 76102
Telephone (817) 870-9822
Telecopier (817) 332-2416

Counsel for Plaintiff-Intervenor
Reliable Consultants, Inc. d/b/a
Dreamer's

## I. Introduction and Statement of Facts

This case involves a challenge by Plaintiff-Intervenor Reliable Consultants, Inc. ("Reliable") to the City of Kennedale's sexually oriented business zoning scheme. Presently pending before the Court is the City's Motion for Summary Judgment, which is based in part upon the assertion that the zoning regulations challenged by Reliable target the secondary effects, and not the content, of adult businesses. In support of its secondary effects argument, the City has submitted the results of a survey of a small number of property appraisers in Tarrant County, Texas regarding their opinions of sexually oriented establishments. (Memorandum regarding Tarrant County Appraisers Survey, Def. Apx. pp. 103-108; Apx. 1-6.)[1] Both the survey and the memorandum summarizing its results were prepared by April M. Virnig, an attorney for the City of Kennedale. (*Id.*) Ms. Virnig was deposed by Reliable regarding her research, credentials, and methodology. A complete transcript of the deposition is provided at Apx. pp. 7-200.

---

[1] Citations to "Def. Apx." refer to the Appendix to Brief in Support of Defendant's Motion for Summary Judgment filed by the City of Kennedale, while citations to "Apx." refer to the Appendix in Support of Plaintiff-Intervenor's Motion in Limine.

Facts uncovered by Reliable during Ms. Virnig's deposition indicate that the survey was not conducted with the proper methodology and controls to render it reliable. (*See* Affidavit of Robert Bruce McLaughlin, Apx. p. 201 § VII.) Given these concerns, Reliable now moves the Court to exclude the survey and memorandum on the basis that it constitute impermissible hearsay under the Federal Rules of Evidence.

## II. The Federal Rules of Evidence Require Exclusion of Ms. Virnig's Appraisal Survey Memorandum.

Subject to few limited exceptions, evidence which qualifies as hearsay is generally inadmissible in federal court. *See* F.R. Evid. 802. The Evidence Rules define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." F.R. Evid. 801(c). Numerous courts have determined that surveys which attempt to assess individual preferences and opinions absent actual testimony from each survey participant constitute hearsay. *See, e.g., Pittsburgh Press Club v. United States,* 579 F.2d 751, 757-58 (3d Cir. 1978). Such testimony then only becomes admissible if it satisfies a rigorous test designed to ensure that only reliable and trustworthy information is heard by the trier of fact. *See, e.g., Brunswick Corp. v. Spinit Reel Co.,* 832 F.2d 513 (10th Cir. 1987).

Survey evidence may be admitted as an exception to the hearsay rule if the survey is material, more probative on the issue than other evidence, and if it has guarantees of trustworthiness. *Brunswick Corp.,* 832 F.2d 513. For an opinion survey to be independently admissible as evidence, the proponent must in some manner validate the sampling technique and explain how reliability was assured. *Baumholser v. Amax Coal Co.,* 630 F.2d 550, 552 (7th Cir. 1980); *King-Size, Inc. v. Frank's King Size Clothes, Inc.,* 547 F.Supp. 1138, 1157-58 (S.D. Tex. 1982); 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(17)(01), at 803-250 to 251 (1981). The burden on the proponent to show reliability is greater if the survey purports to represent subjective data, such as attitudes or beliefs, because of the inherent difficulty of accurately measuring such data. *Judicial Conference of the United States, Handbook of Recommended Procedures for the Trial of Protracted Cases,* 25 F.R.D. 351, 428-29 (1960); *Richardson v. Quik Trip Corp.,* 591 F.Supp. 1151 (S.D. Iowa 1984); *see also National Football League Properties, Inc. v. New Jersey Giants, Inc.,* 637 F.Supp. 507 (D. N.J. 1986). In addition, the individual conducting the survey must have some expertise in the area the survey is designed to assess in order to render the survey itself admissible. *See Froemming v. Gate Federal Savings & Loan Association,* 822 F.2d 723, 732 (8th Cir. 1987) ("The District Court [properly] ruled that [a market value witness] was not qualified to testify as to the value of the mall because he had no substantial experience with syndicating shopping centers, other than the one such syndication he was preparing at the time of trial.").

The Reference Manual on Scientific Evidence, Federal Judicial Center, Rochester, New York (1994), includes a lengthy discussion of the use of surveys in court. In this regard, the Manual states:

> [Surveys] permit an assessment of the extent to which the measured objects or respondents are likely to adequately represent a relevant group of objects, individuals or social organisms. All questions asked of respondents and all other measuring devices can be examined by the court and the opposing party for objectivity, clarity, and relevance, and all answers or other measures obtained can be analyzed for completeness and consistency. In order to permit the court and the opposing party to closely scrutinize the survey, so that its relevance, objectivity and representativeness can be evaluated, the design and execution of the survey are described in detail by the party proposing to offer it as evidence.

*Id.* at 226. The Reference Manual then goes on to identify four critical questions to be asked and answered before a survey is deemed admissible: 1) was the survey designed to address relevant questions?; 2) was participation in the design, administration, and interpretation of the survey appropriately controlled to ensure the objectivity of the survey?; 3) are the experts who designed, conducted or analyzed the survey appropriately skilled and experienced?; and 4) are the experts who will testify about surveys conducted by others appropriately skilled and experienced? *Id.* at 231-33; *see also* McCormick on Evidence § 208, Vol. II, p. 937 *et. seq.* (citing Manual for Complex Litigation 116 (5th Ed. 1981); 4 Louiseel and Mueller, Federal Evidence § 472 at 957 (1979)). Further questions posed by the Reference Manual include:

- were questions on the survey framed to be clear, precise and unbiased?;
- were filter questions provided to reduce guessing?;

- did the survey use open-ended or closed-ended questions? How was the choice in each instance justified?;
- what approach was used to avoid or measure potential order or context effects?;
- if the survey was designed to test a causal proposition, did the survey include an appropriate control group or question?;
- what limitations are associated with the mode of data collection used in the survey?;
- what procedures were used to reduce the likelihood of a biased sample?; and
- what precautions were taken to ensure that only qualified respondents were included in the survey?

Id. at 240-41.

Courts have employed a similar analysis in determining whether survey evidence is admissible. For example, one court identified the following prerequisites for an admissible survey: 1) the proper definition of the universe; 2) selection of a representative sample of the universe; 3) questions framed in a clear, precise and non-leading manner; 4) the use of sound interview procedures by interviewers who had no knowledge of the litigation or the purpose of the study; 5) accurate reporting of the data; 6) analysis of the data in accordance with proper statistical methods; and 7) assurance of the objectivity of the entire process. *See Toys "R" Us, Inc. v. Canarsi Kiddie Shop, Inc.*, 559 F.Supp. 1189 (E. D. N.Y. 1983). Other courts have also determined that the methodological strength of the survey bears directly on its admissibility. *See, e.g., Prudential Insurance Company v. Gibraltar Financial Corporation,* 694 F.2d 1150 (9th Cir. 1983); *Zippo Manufacturing Company v. Rogers Imports, Inc.,* 216 F.Supp. 670, 681-82, 684 (S.D. N.Y. 1963). The Fifth Circuit has reached an identical conclusion. *See Pebble Beach Co. v. Tour 18 Ltd.,* 155 F.3d 526, 544 n.10 (5th Cir. 1998).

As demonstrated by both the deposition of Ms. Virnig (Apx. pp. 7-200) and the affidavit of Robert Bruce McLaughlin (Apx. p. 201 § VII), the Tarrant County Appraisers Survey tendered by the City is not sufficiently trustworthy to overcome the presumption that it constitutes inadmissible hearsay. As reflected in Ms. Virnig's deposition, the survey was not conducted with the proper controls set forth in the Reference Manual and required by the courts to limit sample error, context effects, or confidentiality. (Deposition of April Virnig, Apx. pp. 28-38.) Neither did the survey use proper question format to ensure accurate responses. (Deposition of R. Bruce McLaughlin, Apx. p. 201 § VII.) Moreover, the low response rate and possibility of biased responses also undercut the survey's reliability. (*Id.*) And, as an aside, the raw data attached to the survey also indicate that it was not properly conducted, tabulated, and reported.[2] These defects in the survey, which are more fully identified and explained in the Affidavit of R. Bruce McLaughlin, Apx. p. 201 § VII, render it not only scientifically unreliable but also inadmissible under the cases cited above. The survey should accordingly be excluded from consideration at the summary judgment stage.

---

[2] For example, while the memorandum reports that a total of 36 responses were received, the raw scores for the first question listed under Section A at Apx. p. 2 total 39 responses.

## III. Conclusion

For the foregoing reasons, the memorandum prepared by April Virnig, one of the City of Kennedale's attorneys in this litigation, is inadmissible and should be excluded from this Court's resolution of the pending summary judgment motions.

Respectfully submitted,

/s/ Jennifer Kinsley
H. LOUIS SIRKIN
(Ohio Bar No. 0024573)
JENNIFER M. KINSLEY
(Ohio Bar No. 0071629)
SIRKIN, PINALES &
SCHWARTZ LLP
105 West Fourth Street,
Suite 920
Cincinnati, Ohio 45202
Telephone (513) 721-4876
Telecopier (513) 721-0876

– and –

GARY POLOZOLA
111 N. Houston Street,
Suite 212
Fort Worth, Texas 76102
Telephone (817) 870-9822
Telecopier (817) 332-2416

Counsel for Plaintiff-Intervenor
Reliable Consultants, Inc.
d/b/a Dreamer's

③

Supreme Court, U.S.
FILED
MAR 5 - 2007
OFFICE OF THE CLERK

No. 06-1078

---

In The
# Supreme Court of the United States

◆

DÉJÀ VU OF NASHVILLE, INC., a
Tennessee corporation, and
MERONEY ENTERTAINMENT, INC.,
a Tennessee corporation,

*Petitioners,*

v.

THE METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON
COUNTY, TENNESSEE,

*Respondent.*

◆

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

◆

## BRIEF IN OPPOSITION

◆

FRANCIS H. YOUNG
*Counsel of Record*
METROPOLITAN GOVERNMENT
OF NASHVILLE AND
DAVIDSON COUNTY
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341
*Attorney for the*
*Metropolitan Government*

---

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Since Petitioners received abundant discovery regarding the evidence supporting the enactment of Chapter 6.54, is the fact that Petitioners were denied discovery into the motives of local legislators an issue worthy of this Court's review?

2. Is it necessary for this Court to re-visit the well-established law governing the degree of deference to be afforded municipalities when they enact ordinances targeting the deleterious secondary effects of adult businesses?

3. Since Petitioners were ordered to put all their constitutional challenges to Chapter 6.54 into their "second" injunction motion, can they now be heard to claim they did not raise certain other challenges as a "litigation tactic?"

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED .......... i

TABLE OF CONTENTS .......... ii

TABLE OF AUTHORITIES .......... iv

STATEMENT OF THE CASE .......... 1

SUMMARY OF ARGUMENT .......... 6

REASONS FOR DENYING REVIEW .......... 7

- I. PETITIONERS' PREMISE – THAT THIS COURT'S DECISIONS REGULATING ADULT BUSINESSES ARE "HIGHLY-FRACTURED" – IS INCORRECT. THEIR CONCLUSION THAT "SUBSTANTIAL CONFUSION" REIGNS IN THE LOWER COURTS IS EQUALLY BASELESS. THE ONLY CONFLICTS IN LAW THEY IDENTIFY INVOLVE ISSUES NOT BEFORE THIS COURT .......... 7
- II. CHALLENGING ADULT BUSINESS REGULATIONS HAS ALWAYS BEEN DIFFICULT DUE TO THE REQUIRED DEFERENCE GIVEN TO LEGISLATIVE JUDGMENTS. THE SIXTH CIRCUIT'S DECISION DOES NOT ALTER THE LAW .......... 15
- III. THE SIXTH CIRCUIT FOLLOWED TWO DECADES OF ESTABLISHED LAW IN LIMITING THE SCOPE OF ITS REVIEW AND DISCOVERY .......... 17
- IV. PETITIONERS RECEIVED AN ABUNDANCE OF DISCOVERY, INCLUDING THE LEGISLATIVE RECORD, VIDEOTAPES AND DEPOSITIONS .......... 20

TABLE OF CONTENTS – Continued

Page
V. PETITIONERS HAD THEIR DAY IN COURT ... 23
CONCLUSION ... 25

## TABLE OF AUTHORITIES

Page

CASES

*Abiline Retail #30, Inc. v. Bd of Commr's of Dickson Co. Kansas*, 402 F. Supp. 2d 1285 (D. Kan. 2005) .......... 2

*Baby Tam & Co., Inc. v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) .......... 24

*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) .......... 6, 15

*Bogan v. Scott-Harris*, 523 U.S. 44 (1998) .......... 20

*Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004) .......... 10

*City of Chicago v. Pooh Bah Enterprises, Inc.*, ___ N.E.2d ___, 2006 W.L. 2827608 (Ill. Oct. 5, 2006) .......... 14

*City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) .......... *passim*

*City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) .......... *passim*

*Commonwealth of Kentucky v. Jameson*, ___ S.W.3d ___, 2006 W.L. 3386489 (Ky. Nov. 22, 2006) .......... 14

*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) .......... 10

*Déjà vu of Cincinnati, LLC v. Union Township Bd. Of Trustees*, 411 F.3d 777 (2005), *cert. denied*, 126 S. Ct. 1023 (2006) .......... 7

*Déjà vu of Nashville, Inc. v. Metropolitan Government*, 274 F.3d 377 (6th Cir. 2001) .......... 1, 3

*Déjà vu of Nashville, Inc. v. Metropolitan Government*, 466 F.3d 391 (6th Cir. 2006) .......... 1, 4, 23

## TABLE OF AUTHORITIES – Continued

Page

*DiMa Corp v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) ................13, 18

*Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006) ............................................................11

*Fantasyland Video, Inc. v. County of San Diego*, 373 F. Supp. 2d 1094 (S.D. Cal. 2005) ................................. 2

*Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546 (5th Cir. 2006)............................................. 14

*Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).......................................................12, 13, 19

*G.M. Enterprises, Inc. v. Town of St. Joseph, Wisconsin*, 350 F.3d 631 (7th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004)..........................................2, 9, 13, 18

*Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 374 (2005) .........10, 13

*Green v. Nevers*, 196 F.3d 627 (6th Cir. 1999) .................. 22

*H and A Land Corp. v. City of Kennedale, Texas*, ___ F.3d ___, 2007 W.L. 531982 (5th Cir. Feb. 22, 2007).............................................................................. 14

*Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003) ......................................................... 9, 19

*Hobbs v. County of Westchester*, 397 F.3d 133 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 340 (2005) .............. 13

*Marks v. United States*, 430 U.S. 188 (1977)....................... 9

*McCrothers Corp. v. City of Mandan*, ___ N.W.2d ___, 2007 W.L. 602442 (N.D. Feb. 28, 2007)................. 14

*Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981)........................................................... 20

TABLE OF AUTHORITIES – Continued

Page

*New Albany DVD, L.L.C. v. City of New Albany, Indiana*, 362 F. Supp. 2d 1015 (S.D. Ind. 2005) ............. 3

*Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) .................................12, 13, 19

*Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ........................................................... *passim*

*SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003) .................11

*Tenney v. Brandhove*, 341 U.S. 367 (1951) ....................... 20

*United States v. O'Brien*, 391 U.S. 367 (1968) .................. 20

*University of Texas v. Camenish*, 451 U.S. 390 (1981) ...........................................................23, 24

*U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d 850 (6th Cir. 2005) ............................................... 22

*World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004) ....................11, 16

*Zibtluda, L.L.C. v. Gwinnett County, Georgia*, 411 F.3d 1278 (11th Cir. 2005) ........................................12, 13

OTHER AUTHORITIES:

Paul, Linz, Shafer, *Government Regulation of "Adult" Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects,* 6 Comm. L. & Pol'y 355 (2001) ...............................................................2, 11

## STATEMENT OF THE CASE

The facts and procedural history of the case are set forth in the two Sixth Circuit opinions, *Déjà vu of Nashville, Inc. v. Metropolitan Government*, 274 F.3d 377 (6th Cir. 2001) (Déjà vu App. 30-77) and *Déjà vu of Nashville, Inc. v. Metropolitan Government*, 466 F.3d 391 (6th Cir. 2006) (Déjà vu App. 1-15). Respondent adopts these portions of these decisions herein.

This case was tried in the District Court from April 13-15, 1999. (Déjà vu App. 152).[1] Petitioners called twelve witnesses and introduced twenty-five exhibits.

At the hearing on April 15, 1999, the Metropolitan Government introduced as Defendant's Exhibit 1 a one-and-a-half-inch thick compilation of documents which were placed before each member of the Metropolitan Council when it considered the ordinance which became Chapter 6.54. Included in this compilation of documents were: "secondary effects" studies from other jurisdictions; information on sexually transmitted diseases; "secondary effects" data from the Nashville Police Department; "secondary effects" data from the Nashville Health Department; examples of photos of booths in adult entertainment establishments; Chattanooga's adult entertainment licensing ordinance; and copies of various court decisions dealing with the well-documented secondary effects of adult businesses. Déjà vu App. 159-161; App. 1-7. Petitioners did not object to this "secondary effects" evidence being introduced. App. 16.[2]

---

[1] At this page number in the Déjà vu appendix, the District Court indicates the last day of the hearing was on April 16, 1999, when in fact the proceedings concluded on April 15, 1999.

Petitioners themselves introduced a copy of the ordinance which became Chapter 6.54 as an exhibit during the hearing on April 13, 1999. Déjà vu App. 226. In addition to the eight "Whereas" clauses in the preamble describing the reasons for enacting the ordinance, there are a "Purpose" section and a "Findings" section. The "Findings" section includes thirty-two separate paragraphs of legislative findings of the Metropolitan Council which support the enactment of the ordinance. *Id.* at 226-36.

One of Déjà vu's twelve witnesses was Daniel Linz, an "experimental psychologist," or a "research social psychologist." App. 22. Dr. Linz has written an article with Déjà vu's counsel attempting to repudiate the concept of secondary effects of adult businesses. *See* Paul, Linz, Shafer, *Government Regulation of "Adult" Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 Comm. L. & Pol'y 355 (2001). Dr. Linz frequently testifies in court for adult businesses for the purpose of challenging the studies which establish the adverse secondary effects of those businesses. *See G.M. Enterprises, Inc. v. Town of St. Joseph, Wisconsin*, 350 F.3d 631, 635-36 (7th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004); *Abiline Retail # 30, Inc. v. Bd. Of Commr's of Dickson Co. Kansas,* 402 F. Supp. 2d 1285, 1288, 1292 (D. Kan. 2005); *Fantasyland Video, Inc. v. County of San Diego*, 373 F. Supp. 2d 1094, 1108 (S.D.

---

[2] Petitioners were provided with multiple copies of this evidence seven months prior, on September 18, 1998, when they were served with Respondent's answers to interrogatories and responses to requests for production of documents. App. 11-19.

Cal. 2005); *New Albany DVD, L.L.C. v. City of New Albany, Indiana*, 362 F. Supp. 2d 1015, 1020 (S.D. Ind. 2005).

Despite introducing three full days' worth of proof in the District Court, Petitioners now claim they were reserving the issue of "secondary effects" to litigate later, as a litigation tactic. However, Petitioners knew full well they were ordered to raise all of their constitutional challenges to the ordinance in their second injunction motion. There are at least five places in the record of this case where Petitioners or the courts recognize that Petitioners had to put all their constitutional challenges to Chapter 6.54 into their second injunction motion. They are:

- Magistrate Judge Griffin's October 30, 1998 Order in which she orders that in the potential upcoming (second) injunction motion plaintiffs will raise "all issues upon which the plaintiffs relies (sic) in this case." (Déjà vu App. 129).
- The Sixth Circuit's recognition that Petitioners "rais[ed] all their constitutional challenges to the Ordinance" in their second injunction motion. *Déjà vu of Nashville, Inc.,* 274 F.3d at 386 (Déjà vu App. 34).
- Petitioners' own acknowledgement in their Motion for Review of Magistrate Judge Griffin's Protective Order that they knew they were required to raise "the constitutional challenges to **all** of the other areas of the ordinance in question . . . which Plaintiffs contend are constitutionally infirm." (Emphasis added) (App. 26).
- Petitioners' own acknowledgement in the second injunction motion itself that "[p]laintiffs

are required to raise here 'all' constitutional issues upon which they assert serve as bases for further enjoining the ordinance." (App. 32).

- The Sixth Circuit's October 12, 2006 opinion in which the court stated that the District Court "addressed what appears to be all of Déjà vu's challenges to the Ordinance, leaving no unresolved issues of fact that would necessitate a trial." *Déjà vu of Nashville, Inc.*, 466 F. 3d at 398 (Déjà vu App. 13).

These repeated acknowledgements of the all-inclusiveness of Petitioners' second injunction motion show that all parties and the courts knew that Petitioners had to shoot all the arrows in their quiver in their second injunction motion. Otherwise, Petitioners would be able to raise constitutional issues one by one, thus prolonging this litigation forever.

A number of misstatements in Petitioners' Statement of the Case must be corrected. First, there is no requirement that a business owner license applicant or an entertainer permit applicant must appear in public before the Sexually Oriented Business Licensing Board ("the Board"), as Petitioners state on page 3 of the Petition. The application process in Chapter 6.54 does not contemplate a mandatory personal appearance before the Board. (*See* Déjà vu App. 304-316 for business licenses; Déjà vu App. 322-330 for entertainer permits). In fact, if the Board declines to issue either a license or a permit, the applicant may immediately appeal such denial to the Circuit or Chancery Courts of Davidson County. (Déjà vu App. 314, 328). No personal appearance before the Board is required.

Petitioners also provide a lengthy description of administrative proceedings before the Board in 1999 surrounding Déjà vu's initial license application. Petition, at 6-7. Presumably, Petitioners are trying to show that the Board allegedly acts as a "censorship board" capable of denying adult entertainment licenses and permits on a whim. The inclusion of a transcript of an April 27, 1999 Board meeting (Déjà vu App. 390) is completely misleading, since from the transcript it appears Déjà vu never received a license in 1999. Déjà vu App. 392. In fact, Déjà vu requested an evidentiary hearing after the initial denial of its license, and it was in fact issued a license less than one month later, on May 26, 1999. Déjà vu App. 420.

In any event, this is completely irrelevant to the issues raised in the petition. The actions of a different Board eight years ago – prior to a lengthy period where Chapter 6.54 was not enforced at all – have no bearing on how Chapter 6.54 is being enforced today. In fact, both Petitioners – Déjà vu and Ken's Gold Club (the trade name under which Meroney Entertainment, Inc., operates (Déjà vu App. 352)) – received their sexually oriented business licenses at the newly reconstituted Board's meeting on December 28, 2005 and have operated continuously under them since that date. (*See* minutes of Board's December 28, 2005 meeting, App. 36-37).[3]

◆

---

[3] The District Court's April 27, 2005 Order dissolving the injunction did not take effect until August 1, 2005, by its terms. Déjà vu App. 207. The government requested this delay to allow time for the Mayor to appoint new Board members, for the Board to hire an inspector, and for the creation of the forms to use in administering Chapter 6.54. The first Board meeting at which fully completed license applications were considered was the December 28, 2005 meeting, at which eleven licenses were approved, including those requested by Petitioners. App. 36-37.

## SUMMARY OF ARGUMENT

The lower courts have no difficulty judging the constitutionality of adult business regulations under the principles set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). The courts are not troubled by the *Renton* rule that municipalities may reasonably rely on the experiences of other cities, and that empirical data of local adult businesses' "secondary effects" is not required to justify ordinances regulating such businesses.

The courts give municipalities great deference in experimenting with solutions to reduce the "secondary effects" of adult businesses. Since *Renton*, it has been – and continues to be – difficult for such businesses to persuade courts to override legislative judgments regarding how best to control such secondary effects. Petitioners' complaint about being deprived of discovery in this case is really an expression of their dissatisfaction with the deference the courts afford municipalities on this issue. In fact, in this case, Petitioners received an abundance of discovery, through receiving copies of the evidence upon which the Metropolitan Council relied in enacting Chapter 6.54 and videotapes of Council meetings. Petitioners also took four depositions of Metropolitan Government officials on topics of Petitioners' choosing.

Finally, this is not the first time that a Deja vu entity has argued for certiorari to this Court based on purported confusion among the lower courts due to this Court's "highly-fractured" opinions in *Alameda Books, Erie and Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991). However, as this Court determined that certiorari was **not** appropriate in *Déjà vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees*, 411 F.3d 777 (6th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1023 (2006) (Supreme Court no. 05-374), neither should certiorari be granted here. The lower courts have no difficulty applying *Renton* and its progeny to determine whether adult business regulations violate the First Amendment. Petitioners are simply unhappy with the results of that application and they would prefer a new rule.

Certiorari should be denied.

◆

## REASONS FOR DENYING REVIEW

### I. PETITIONERS' PREMISE – THAT THIS COURT'S DECISIONS REGULATING ADULT BUSINESSES ARE "HIGHLY-FRACTURED" – IS INCORRECT. THEIR CONCLUSION THAT "SUBSTANTIAL CONFUSION" REIGNS IN THE LOWER COURTS IS EQUALLY BASELESS. THE ONLY CONFLICTS IN LAW THEY IDENTIFY INVOLVE ISSUES NOT BEFORE THIS COURT

Petitioners attempt to make a case for this Court's clarification of rules governing municipal regulation of adult businesses by establishing a faulty premise, and then reaching an erroneous conclusion. Although this Court's decisions on adult business regulations have resulted in multiple opinions, the conclusions on the issues germane to this case are clear. Moreover, the "confusion" suggested by petitioners has not occurred on any of the issues presented in this case.

Petitioners are correct that *Renton*, 475 U.S. at 51-52 established the baseline for the regulation of adult businesses. Petition, p. 12. They note that in this decade this Court has issued plurality decisions in two adult business cases: *City of Erie*, 529 U.S. at 282 and *Alameda Books,* 535 U.S. at 428. At that point petitioners depart from reality.

The disagreement among justices in this Court is focused not on the level of scrutiny by the courts or on the deference that the courts should pay to the reasonable judgments of municipalities in relying upon the studies or experiences of others. This was a lesson delivered in *Renton*, 475 U.S. at 51-52, and followed by the pluralities in *Erie,* 529 U.S. at 283 (plurality opinion) and *Alameda Books*, 535 U.S. at 438 (plurality opinion). Not even the dissenting justices in those cases had difficulty with that basic rule. *See, e.g.*, *Erie,* 529 U.S. at 310 (Souter, J., dissenting) and *Alameda Books*, 535 U.S. at 460 (Souter, J., dissenting).

The principal divergence from *Renton* to the present focuses on the *type* of evidence that should be considered by municipalities to justify the regulation of adult businesses. Dissenting justices in *Erie* and *Alameda Books* felt that "empirical" evidence was necessary to establish adverse impacts of adult businesses, and to justify the municipal regulation of those businesses. *See, e.g.*, *Erie,* 529 U.S. at 314-16 (Souter, J., dissenting) and *Alameda Books*, 535 U.S. at 458 (Souter, J., dissenting). Petitioners gloss over this critical distinction in their bid to convince this Court that its decisions have created a "confusing body of case law." Petition, p. 14. In fact, the law on this subject is fairly clear and Petitioners cannot make a case to the contrary.

Admittedly, the existence of plurality opinions requires one extra step in selecting the precedential weight of a decision. No one disputes the application of the test in *Marks v. United States*, 430 U.S. 188, 193 (1977) to determine the holding of the Court when a plurality decision occurs. Similarly, none of the courts of appeal have had any difficulty in applying the *Marks* rule to determine the rule of this Court in *Erie* or *Alameda Books*, for the purpose of determining how those cases have "clarified" the baseline doctrine established in *Renton*. Petitioners' claims to the contrary are simply baseless.

Petitioners mis-cite *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) for the proposition that the .evidentiary showing on the quantity of "empirical evidence" necessary to meet the requisite test is part of that "confusing body of law." Petition, p. 14. Just the opposite is true: The *Heideman* court construed this Court's holding in *Alameda Books* to mean that cities need not rely upon empirical evidence at all in order to justify their regulations of adult businesses. 348 F.3d at 1197-99. That court, like the plurality and Justice Kennedy's concurring opinion in *Alameda Books*, rejected the notion that empirical evidence is required at all. *Id.*

Similarly, other courts of appeal have had little difficulty in reading the *Alameda Books* decisions on this critical issue. In *G. M. Enterprises, Inc.,* the court addressed the plaintiff's argument that empirical evidence of the type necessary for the support of expert opinions should be required. In rejecting the principle advanced by Petitioners the court stated:

> Under the plaintiff's view, the Town cannot demonstrate a reasonable belief in a causal relationship between the activity regulated and secondary

> effects, as required by *Alameda Books and Renton*, unless the studies it relied upon are of sufficient methodological rigor to be admissible under *Daubert [v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).] **This argument is completely unfounded.**

350 F.3d at 640 (emphasis supplied). The court explained that the plurality opinion in *Alameda Books* "bluntly rejected" the suggestion in Justice Souter's dissent that "the municipality be required to present empirical data." *Id.* The court held that such a requirement "would impose an unreasonable burden on the legislative process" and that *Alameda Books* imposed no such requirement to prove definitively that a regulation would reduce adverse secondary effects. *Id.*

That court was not confused.

A similar issue was raised in *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005), *cert. denied,* 126 S. Ct. 374 (2005). Plaintiff suggested that *Alameda Books* required a municipality to show that its conclusions were supported by statistical (empirical) evidence demonstrating that adverse secondary effects resulted at the specific locations that were being regulated. The court rejected that contention, stating: "This is simply not the law." *Id.* The Ninth Circuit had no difficulty in applying the basic *Renton* standard, with the procedural clarification set forth in *Alameda Books*. It was able to state what "simply" was or was not the law, without any so-called confusion on the appropriate standard.[4] *Accord: Center for*

---

[4] Petitioners cite *Gammoh* for the proposition that the court had some confusion regarding the methodological standards a court must employ to evaluate the adverse impacts of an adult business ordinance.

(Continued on following page)

*Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1168 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004) (holding *Alameda Books* clarifies *Renton* standard regarding evidentiary procedures, but that "empirical data" requirement "was specifically rejected in *Alameda Books*"); *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1196 (9th Cir. 2004) (applying *Alameda Books* evidentiary burden and finding its application in line with other courts of appeal).

Petitioners cite *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003), *cert. denied,* 540 U.S. 820 (2003), in an attempt to show confusion about the state of the law. They note the potential effectiveness of an article in meeting the requisite evidentiary burden.[5] Petition, pp. 15-16. The only "confusion" generated by the article is that of Petitioners. The court in *SOB* flatly rejected the contention that the article – which questions the methodology of various secondary effects studies by municipalities – created an issue under *Alameda Books* or *Erie*. *Id.* at 863. In purported "contrast," Petitioners cite *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1169 (10th Cir. 2006), which

---

Petition, p. 19. That is false. Petitioners' citation (to page 1126 of *Gammoh*) contains no such confusion. On the following page the court states simply that it will not "specify the methodology" which *municipalities* may employ, because courts are not in the "business of second-guessing" city planners, citing and quoting *Alameda Books*. The "confusion" noted by Petitioners is theirs alone.

[5] The article is Paul, Linz, Shafer, *Governmental Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 Comm. L. and Pol'y 355 (2001). Petitioners' counsel of record actually co-authored this article, a fact unclear from the way the article is cited in the petition. Citing as an authoritative source an article co-written by counsel of record is a questionable practice, at best.

referenced the article in dictum, stating only that such evidence **might** be relevant.

The bulk of Petitioners' argument rests on the proposition that cases from the Eleventh Circuit considered "empirical evidence" and reached one result, but when other courts considered the same type of evidence they reached "the exact opposite result." Petition, p. 16. Once again, Petitioners establish a false premise and use that to reach an erroneous conclusion. For example, the court in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), *cert. denied,* 536 U.S. 904 (2002) did consider an empirical study of local crime. That was not because such an empirical analysis is *required* by *Renton, Erie* or *Alameda Books.* Rather, the county in that case *elected* to conduct an empirical study of local conditions. The court determined that if that local study conflicted with other studies regarding crime in other locations, the county could not reasonably rely on the other studies, and ignore the local one. *Id.* at 986. That is common sense. It reflects neither confusion in the applicable standard nor a conflict among the circuits.

The court in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251 (11th Cir. 2003), *cert. denied,* 541 U.S. 988 (2004), cited and applied the rule in *Renton* but noted that the county failed to produce *any* evidence to justify the enactment of its ordinance. 337 F.3d at 1267.

The Eleventh Circuit's most recent treatment of the issue lays to rest any contention that there is confusion among the circuits in judging the constitutionality of adult business regulations. In *Zibtluda, L.L.C. v. Gwinnett County, Georgia*, 411 F.3d 1278 (11th Cir. 2005), the court squarely dealt with the level of scrutiny to apply to regulations targeting the "secondary effects" of adult businesses. Relying on *Renton* and *Alameda Books*, the court found that local governments may rely on "the experience of other cities, studies done in other cities, case law reciting findings on the issue, as well as [the officials'] own wisdom and common sense" in enacting adult business regulations. *Id.* at 1286. In *Zibtluda*, the Eleventh Circuit examined the face of the subject ordinance, its text, the preamble or express legislative findings associated with it, its legislative history, and studies and information of which legislators were aware. Based on that alone, the Court found the ordinance constitutional because it clearly was enacted to target the secondary effects of adult businesses. *Id.* at 1288-89.

This is from the circuit Petitioners contend creates the conflict.

The established rule is applied in those cases which Petitioners attempt to show conflict with *Flanigan's Enterprises* and *Peek-A-Boo Lounge*. Petition, pp. 16-18. In *G. M. Enterprises, supra; DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999), *cert. denied,* 529 U.S. 1067 (2000);[6] and *Gammoh*, *supra*, the courts adhered to the well-established rule from *Renton* and its progeny that a municipality may rely on evidence that it reasonably believes to be relevant. Other circuits agree. *See*, *Hobbs v.*

---

[6] *DiMa* was decided in 1999, long before the purported "confusion" generated by this Court's decisions in *Erie* and *Alameda Books*. It is not surprising, though, that it reaches the same conclusion as post-*Alameda Books* decisions that expert testimony questioning the truth of the studies relied upon is not relevant to an analysis whether the municipality was reasonable in considering them.

*County of Westchester*, 397 F.3d 133, 153 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 340 (2005); *H and A Land Corp. v. City of Kennedale, Texas*, ___ F.3d ___, 2007 W.L. 531982 (5th Cir. Feb. 22, 2007); *Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546, 559 (5th Cir. 2006). State courts of last resort also consistently apply *Renton* and its progeny and reach the same result. *See McCrothers Corp. v. City of Mandan*, ___ N.W.2d ___, 2007 W.L. 602442, *13 (N.D. Feb. 28, 2007); *Commonwealth of Kentucky v. Jameson*, ___ S.W.3d ___, 2006 W.L. 3386489, *20-*23 (Ky. Nov. 22, 2006); *City of Chicago v. Pooh Bah Enterprises, Inc.*, ___ N.E.2d ___, 2006 W.L. 2827608, *19-*21 (Ill. Oct. 5, 2006).

Expert testimony or similar studies that question the *truth* of studies upon which a municipality relies are not germane to the *Renton* analysis. Any "conflict" among the circuits on this issue which Petitioners attempt to create is illusory.

Finally, Petitioners raise two legal issues relating to adult business regulations which are not present in this case. Petition, p. 18. Whether appellate courts may disagree upon the legal effect of regulations governing "purely retail" adult bookstores (i.e., no on-premises viewing) or regulations governing "one-time" adult presentations, are not issues in contention here. Both Petitioners regularly present live "sexually oriented entertainment" as defined by Chapter 6.54. Any discussion of these other issues in this case is strictly academic.

## II. CHALLENGING ADULT BUSINESS REGULATIONS HAS ALWAYS BEEN DIFFICULT DUE TO THE REQUIRED DEFERENCE GIVEN TO LEGISLATIVE JUDGMENTS. THE SIXTH CIRCUIT'S DECISION DOES NOT ALTER THE LAW

Whether an adult business may take unlimited discovery in a case challenging an adult business regulation is addressed in Section III below. However, Petitioners assume that their inability to take such discovery in this case will make it "virtually impossible" to challenge such regulations. Petition, p. 20. Petitioners then construct an argument so contorted that confusion appears to be the object.

Petitioners bemoan the difficulty of a litigant to "cast doubt upon" a government's rationale, the standard first set forth in 2002 in *Alameda Books*, 535 U.S. at 438-39 (plurality opinion). Justice Souter *dissented* from this opinion, concluding that municipalities must produce empirical evidence to justify their regulation of adult businesses. 535 U.S. at 458-60. Justice Souter took the same position in *Erie*, 529 U.S. at 313-17 (Souter, J., dissenting). However, his opinion in *Erie* recognizes that he had **changed his mind** since writing a concurring decision in *Barnes,* 501 U.S. at 582 (Souter, J. concurring). 535 U.S. at 316-17. It is this concurring opinion in the 1991 *Barnes* decision, which the author has since disavowed, that forms the basis for Petitioners' conclusion the body of adult entertainment law is unworkable. Petition, p. 20.

Petitioners claim to need discovery on the governmental interest at the time of enactment. Petition, p. 20. As set forth in more detail in the discussion below, the legislative record justifying the enactment is sufficient to show the evidence the municipality relied upon; no one may probe the motivations of a legislator in voting for or against a bill. *See* Section III, *infra*.

Petitioners cite to *World Wide Video*, 368 F.3d at 1190, 1195, as a case illustrating their need for discovery. Petition, p. 22. Petitioners represent that the plaintiff in that case provided evidence refuting the city's conclusion that adult businesses caused increased crime and lowered property values, but the plaintiff did not succeed in "casting direct doubt" under *Alameda* because evidence of "litter" near the businesses had not been refuted.[7]

Petitioners misrepresent the facts and holding of that case. First, the city's regulation was not upheld on the basis of litter-prevention alone. The plaintiff in *World Wide Video* failed to "cast direct doubt" upon evidence of public lewdness, drug transactions and prostitution at the adult businesses in the city. 368 F.3d at 1190 and 1195-96. Second, Petitioners fail to mention that the "litter" at issue was pornographic material left around the adult businesses "featuring graphic depictions of sexual acts." *Id.* at 1190. Both the appellate and trial courts held that the elimination of this litter, which was found routinely by minors, served a substantial governmental interest in the protection of minors. *Id.* at 1195. There can be little doubt that the regulations in *World Wide Video* were appropriate to combat secondary effects, regardless of the availability of discovery.

---

[7] In their footnote on the subject, Petitioners question whether litter can ever be a basis for suppressing expression. Petition, p. 22 n. 11. But each of the decisions cited therein considered the eradication of litter for aesthetic reasons. None of those cases involved **pornographic litter that was regularly viewed by minors**, which was at issue in *World Wide Video*.

In complaining about their inability to obtain discovery into the Metropolitan Council's motives in enacting Chapter 6.54, Petitioners are really complaining about the degree of deference courts afford local governments in trying to fashion remedies to address local problems. Members of the local legislative body are in a better position to gather and evaluate data on local problems than the judiciary, and they are to be afforded substantial deference in their assessments and evaluations of solutions to problems within their city. *Alameda Books*, 535 U.S. at 440 (O'Connor, J., plurality).

## III. THE SIXTH CIRCUIT FOLLOWED TWO DECADES OF ESTABLISHED LAW IN LIMITING THE SCOPE OF ITS REVIEW AND DISCOVERY

Petitioners proclaim that the Sixth Circuit opinion "subverts" the rules of evidence by limiting both the scope of review of legislative action and permissible discovery of that action. Petition, p. 23. They argue that the courts (including this Court) are somehow confused in thinking that their role is *not* to determine the objective truth of studies and other data relied upon by municipalities in justifying the regulation of adult businesses. Only the Petitioners are confused: consistent precedent from this Court over the previous twenty years guided the Sixth Circuit and the District Court to correctly limit both the scope of review and permissible discovery.

The limited scope of review of a court considering the validity of an adult business ordinance was set forth first in *Renton*, 475 U.S. at 51-52 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.") Thus, a city's reasonable belief in the evidence relied upon – and **not the objective truth of that evidence** – is all that reviewing courts require to justify the enactment. This standard was reconfirmed by this Court in *Erie,* 529 U.S. at 296 (plurality opinion, citing and quoting *Renton*) and at 313 (Souter, J., concurring in part and dissenting in part, citing and quoting *Renton*), and again in *Alameda Books,* 535 U.S. at 438 (plurality opinion, citing and quoting *Renton*) and 451 (Kennedy, J., concurring, citing and quoting *Renton*).

When Petitioners decry the unfairness of courts not pursuing the actual truth, they show not an injustice but their own dissatisfaction with established law.[8] Were the courts required to weigh conflicting evidence regarding the adverse impacts of adult businesses, the rule in *Renton*, *Erie* and *Alameda Books* would be abrogated: municipalities would *not* have the right to rely upon the studies and experiences of other jurisdictions. The established law is that *proof* of adverse secondary effects of adult businesses is not required by municipalities. *See, e.g., G.M. Enterprises, Inc.,* 350 F.3d at 640 (holding *Alameda Books* does not require municipalities to prove secondary effects if they reasonably rely on the studies of others); *Gammoh,* 395 F.2d at 1126 n. 5 (same); *South Salt Lake*, 348 F.3d at 1197 (same).

---

[8] Petitioners refer to the holding in *DiMa Corp.*, 185 F.3d at 831, Petition, p. 23 n. 12, as prohibiting an inquiry into the truth of studies relied upon by municipalities. Petitioners' reading of that case is accurate. What is inaccurate is their assertion that the Court of Appeals' conclusion was somehow erroneous. This Court denied certiorari in *DiMa* for good reason – the decision was in line with the *Renton* rule and subsequent endorsements of that rule by this Court.

The Eleventh Circuit decisions in *Flanigan's Enterprises* and *Peek-A-Boo Lounge* provide no support for Petitioners' contention. *See* Petition, pp. 24-25. Both cases involved the plain application of the proper standard from *Renton*, *Erie* and/or *Alameda Books*. However, the courts there found that for specific factual reasons not present in this case the municipalities did not meet the applicable standard. In *Flanigan's Enterprises* the court found that the county could have simply relied upon the studies of others. 242 F.3d at 985 (citing *Erie* and *Renton*). However, it did not. It conducted its own study of its own actual experiences, which did not support any finding that the enacted regulations were necessary to curb adverse impacts of adult businesses. *Id.* at 986. The court in *Peek-A-Boo Lounge* cited and applied the rule in *Renton* but noted that the county failed to produce *any* evidence to justify the enactment of its ordinance. 337 F.3d at 1267.

Neither of the facts that distinguish the decisions in those cases is present here. There was ample evidence of "secondary effects" before the Metropolitan Council when it enacted Chapter 6.54. Petitioners only seek to challenge the "truth" of that evidence, a standard which this Court has rejected for more than twenty years.

Finally, Petitioners argue that the deprivation of sweeping discovery rights has somehow impeded their rights under *Alameda Books.* Petition, pp. 26-27.[9] That argument is baseless. This Court has long held that a challenge to a legislative enactment may **not** include sweeping discovery of the motivations, thoughts or deliberative processes of the legislative body. *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) ("[i]t simply is not consonant with our scheme of government for a court to inquire into the motives of legislators. . . ."); *quoting Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469-70 (1981); *United States v. O'Brien,* 391 U.S. 367, 383 (1968).

## IV. PETITIONERS RECEIVED AN ABUNDANCE OF DISCOVERY, INCLUDING THE LEGISLATIVE RECORD, VIDEOTAPES AND DEPOSITIONS

In complaining about not being permitted to take discovery, Petitioners overlook the amount of discovery they actually **did** take. Petitioners served interrogatories and document production requests, to which Respondent served its answers and responses on September 18, 1998, a full seven months before the three-day injunction hearing in April, 1999. App. 11-19. There is no question that Petitioners had access to the legislative record on which the Metropolitan Council relied, since multiple copies of all these documents were furnished to counsel for Petitioners as part of the discovery responses. App. 15-17. This legislative record was actually filed with the Metropolitan Clerk in 1997 prior to the first vote on the ordinance. App. 4-7.

---

[9] Earlier, Petitioners referred to the District Court's limitation on the scope of discovery as a "'no discovery' ruling." Petition, p. 23. That is incorrect. There is no dispute that Petitioners had access to the legislative record of the Respondent that was offered to justify the ordinances at issue. App. 15-17. Petitioners were simply limited by the protective order from undertaking impermissible discovery based on the authorities discussed above.

Just like any citizen, Petitioners had unfettered access to these materials once they were filed with the Metropolitan Clerk, since the Metropolitan Clerk's office is the office charged with the recording and safekeeping of minutes, resolutions and ordinances of the Metropolitan Council and of all other documents relating to official actions of the Metropolitan Government. App. 41. Petitioners could have actually reviewed this evidence before Chapter 6.54 became law.

Petitioners also overlook the depositions to which the government did not object, and which were actually taken on October 21 and 28, 1998. The government did not object to subject areas 1-4, 20, 34 and 37 of the Rule 30(b)(6) deposition notice (Déjà vu app. 374-381), and deponents were made available to testify on these topics. Déjà vu App. 119-120.[10] The following government officials were deposed:

- Terry Cobb, Director of Department of Codes Administration

---

[10] Requests 1-2 pertained to "the initial proposal of and subsequent drafting of the ordinance." Requests 3-4 sought "any and all documents submitted to the Metropolitan Government of Nashville and Davidson County regarding, concerning, related to, or in furtherance of the initial proposal of and subsequent drafting, revisions, adoption and enactment" of the ordinance. Request 20 pertained to the creation and appointment of persons to the "Sexually Oriented Business Licensing Board." Request 34 pertained to the identities of each and every "sexually oriented business/establishment" located within Davidson County. Request 37 pertained to the method by which the licenses and permit fees and the applicable renewal fees were determined.

- Marilyn Swing, Metropolitan Clerk
- Lon F. West, Zoning Administrator
- Donald Jones, Esq., Director of Council Research Staff for the Metropolitan Council and Special Counsel to the Council (App. 43-46).

In addition, Petitioners were provided copies of all videotapes or audiotapes of all Metropolitan Council and committee meetings at which Chapter 6.54 and any amendments thereto were discussed, as well as the minutes of those meetings. App. 12, 15.

Finally, Petitioners' claim that they will be denied "raw crime data" in future cases should be tempered by the fact that the Magistrate Judge allowed them access to such data in this case, yet they never obtained it because they never provided the Respondent with the street addresses of the businesses for which they sought such data. (Déjà vu App. 124-125).

The trial court acted well within its discretion in granting the protective order to limit discovery into information not relevant to a proper review of the justification for the enactment of Chapter 6.54. *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 862 (6th Cir. 2005); *Green v. Nevers*, 196 F.3d 627, 632 (6th Cir. 1999). Accordingly, Petitioners were not impaired in their ability to analyze and attempt to call into question the reasonableness of the Metropolitan Council's reliance on the information before it, as provided in *Alameda Books*.

## V. PETITIONERS HAD THEIR DAY IN COURT

Petitioners contend it was improper for the District Court to convert their second "preliminary" injunction into a permanent one and to dismiss the case in December, 1999. Petition, at 27-28. However, this is hardly the typical case where the injunction hearing was being conducted in *haste*, or where less than formal procedures and evidentiary standards were being applied than those which would accompany a trial on the merits, as described in *University of Texas v. Camenish*, 451 U.S. 390, 395 (1981).

Petitioners' first "preliminary" injunction was entered on December 8, 1997. *Deja vu of Nashville, Inc.,* 466 F.3d at 393; Déjà vu App. 3. That injunction was based on a finding that Chapter 6.54 failed to provide "prompt judicial review" of a Board decision to deny, suspend, or revoke a license or a permit. Approximately one year later, that injunction was dissolved. *Id.*

In the interim, Petitioners served written discovery on defendants to which defendants responded, and Petitioners took four depositions of Metropolitan Government officials. App. 11-19 and 43-46.

Shortly after the dissolution of the first injunction, Petitioners filed their second "preliminary" injunction motion on December 17, 1998 (fourteen months after the case was filed). This was the motion for "preliminary" injunction in which Petitioners had been ordered to raise their constitutional challenges to **all** of the other areas of the ordinance, and not to "piecemeal" their requests for injunctive relief. Déjà vu App. 129. Petitioners acknowledge they knew they had to raise "'all' constitutional issues upon which they assert serve as bases for further enjoining the ordinance" in that motion. App. 32. As a result, the self-described second injunction motion contained "detailed and complex legal arguments that are of the utmost constitutional concern." App. 34. The hearing on this second "preliminary" injunction motion occurred April 13, 14 and 15, 1999, nearly eighteen months after Petitioners filed this case. Déjà vu App. 152.

The concerns expressed in *Camenish* simply do not exist in this case. Petitioners had plenty of time to prepare for the hearing. They had the benefit of receiving through discovery hundreds of pages of evidence upon which the Metropolitan Council relied. They received videotapes and audiotapes of all Metropolitan Council and committee meetings at which Chapter 6.54 and any amendments thereto were discussed. They took four depositions. At the hearing, they called twelve witnesses, including two "experts," and they introduced thousands of pages of documents, either before or during the hearing. The hearing was not conducted in haste, nor were less than formal evidentiary procedures employed. This multi-day hearing had all the attributes of a trial, conducted after voluminous discovery had occurred. Since, in their own words, petitioners knew they had to raise *all* their constitutional challenges in this second motion, there is no injustice in realizing that this litigation has finally come to an end, ten years after it started. App. 26, 32.

What distinguishes this case from *Baby Tam & Co., Inc. v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) (Petition p. 28), is the fact that the District Court herein **ordered** Petitioners to put all their remaining constitutional challenges into their second injunction motion, and plaintiffs repeatedly acknowledged they knew they were ordered to do so. Since this was not the case in *Baby Tam*, that case fails to support Petitioners' argument on this point.

◆

## CONCLUSION

The Petition for certiorari should be denied.

Respectfully submitted,

FRANCIS H. YOUNG
*Metropolitan Attorney*
DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

| | |
|---|---|
| DEJA VU OF NASHVILLE. INC.,<br>a Tennessee Corporation, *et al.*,<br>Plaintiffs,<br>v.<br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity,<br>Defendants. | Case No. 3-97-1066<br>Judge Higgins<br>Magistrate Judge Griffin<br>Consolidated Cases |
| JERRY C. PENDERGRASS, *et al.*,<br>Plaintiff,<br>v.<br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,<br>Defendant. | No. 3-97-1176<br>Judge Higgins<br>Magistrate Judge Griffin<br>(Filed Apr. 12, 1999) |

## NOTICE OF FILING

Come now defendants, through counsel, and file a copy of all the materials which were placed in front of each Metropolitan Council member when the Council began consideration of the legislation which ultimately became Chapter 6.54. These materials are referenced in the affidavit of Shayna Abrams, attached as Exhibit A to defendants' reply to plaintiffs' response to motion for a protective order (Docket no. 53).

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY
JAMES L. MURPHY III, # 9589
DIRECTOR OF LAW

/s/ James L. Charles [FHY]
James L. Charles, # 9007
Associate Director of Law

/s/ Francis H. Young
Francis H. Young, # 16554
Metropolitan Attorney

/s/ Shayna Abrams [FHY]
Shayna Abrams, # 16702
Metropolitan Attorney
204 Metropolitan Courthouse
Department of Law
Nashville, TN 37201
(615) 862-6341

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been hand-delivered to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 13th day of April 1999.

/s/ Francis H. Young
Francis H. Young

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

DEJA VU OF NASHVILLE, INC.,
a Tennessee Corporation, *et al.*,

Plaintiffs,

v.

THE METROPOLITAN
GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY,
TENNESSEE, and EMMETT
TURNER, Chief of Police,
in his official capacity

Defendants.

Case No. 3-97-1066
Judge Nixon
Magistrate Griffin

and

JERRY C. PENDERGRASS, et al.,

Plaintiffs,

v.

METROPOLITAN
GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY,

Defendant.

Case No. 3-97-1176

## AFFIDAVIT OF SHAYNA ABRAMS

(Filed Oct. 8, 1998)

Shayna Abrams first being duly sworn, deposes and states as follows:

1. I, Shayna Abrams, am an attorney with the Metropolitan Department of Law. Having full personal

knowledge of the matters stated herein, I give this affidavit.

2. I supervised the preparation and compilation of a binder for each member of the Metropolitan Council in connection with Bill no. 97-796.

3. One binder was filed with the Metropolitan Clerk and one binder was placed by me on the desk of each Metropolitan Council member in the Council Chamber prior to the first Council meeting at which Bill No. 97-796 was considered.

4. Each binder contained the following items:

a. A copy of the proposed ordinance including the "whereas" clauses and the Preamble.

b. The following reports from the Metropolitan Police Department:

- A lengthy report from Police Intelligence concerning criminal activity within the sexually oriented entertainment industry in other states as well as locally including a 1993 conviction of an operator of "Cleopatra's Massage" for promoting prostitution.
- A 1990 report from the Assistant Chief of Police regarding sexual activity and prostitution at local adult entertainment establishments, dancing at local sexually oriented establishments by underage persons, and unsanitary conditions, usually within the booths in adult entertainment establishments.
- A 1984 report prepared by the former Chief of Police documenting the unsanitary conditions of the adult entertainment businesses.

- Two reports of the police service calls to adult businesses or the areas near the business covering 1-1-92 to 4-14-93 and 1-1-96 to 1-31-97.
- A report from two officers who visited various adult entertainment businesses from 3-31-97 to 4-11-97 describing what they witnessed at these businesses.

c. Reports from the Metropolitan Health Department from 1994 and 1997 regarding the unsanitary conditions at various adult entertainment businesses. An affidavit of Dr. Michael Bongiovanni discussing the transmission of HIV and hepatitis B from bodily fluids. A 1990 memo from Preventative Health Services of Tucson regarding the need for regulation in adult entertainment establishments due to the spread of infectious and contagious disease through sexual contact.

d. 1997 Photos taken by the Metropolitan Police Department of the Purple Onion, an adult entertainment establishment.

e. A copy of Chattanooga's ordinance, litigated in *DLS v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1996).

f. A copy of the Sixth Circuit opinion in *DLS v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1996).

g. A copy of the district court's opinion in *DLS v. City of Chattanooga,* 894 F.Supp. 1140 (E.D. Tenn 1995).

h. A copy of the district court's opinion in *DLS v. City of Chatanooga,* 914 F.Supp. 193 (E.D. Tenn. 1995).

i. A 1984 report regarding the zoning of adult entertainment businesses in Nashville.

j. The 1989 Report of the Minnesota Attorney General's Working Group on the Regulation of Sexually-oriented Businesses.

k. A planning study by the city of Phoenix, Arizona discussing adult businesses and comparing the crimes in control areas (areas without adult businesses but with a similar population and characteristics) to crimes in study areas (areas with adult businesses).

l. Summaries of various land use studies listing the secondary effects found regarding sexually-oriented businesses in the study area. The summaries included: Phoenix, AZ, Tucson, AZ, Garden Grove, CA, Los Angeles, CA, Whittier, CA, Indianapolis, IN, Minneapolis, MN, Cleveland, OH, Oklahoma City, OK, Amarillo, TX, Austin, TX, Beaumont, TX, Houston, TX, and Seattle, WA.

m. A 1986 Austin, Texas, study conducted in support of a new zoning ordinance which found increased crime and decreased property values in areas near sexually-oriented businesses.

FURTHER, AFFIANT SAITH NOT

/s/ Shayna Abrams
Shayna Abrams

Sworn to and subscribed before me, a Notary Public, this 7th day of October, 1998.

/s/ Steven D. Mayo
NOTARY PUBLIC

My Commission Expires: 9-23-2000.

# UNITED STATES DISTRICT COURT
# MIDDLE DISTRICT OF TENNESSEE
# NASHVILLE DIVISION

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, INC., et al., | ) | |
| Plaintiffs, | ) | |
| vs. | ) | No. 3-97-1066<br>Judge Higgins |
| METROPOLITAN GOVERNMENT OF NASHVILLE, AND DAVIDSON COUNTY, TENNESSEE, et al., | ) | |
| Defendants. | ) | |

---

## TRANSCRIPT OF PROCEEDINGS – PRELIMINARY INJUNCTION

VOLUME III of Three

BEFORE THE HON. THOMAS A. HIGGINS,
U.S. District Judge

on April 15, 1999

---

*APPEARANCES*:

As hereinbefore noted.

* * *

[505] THE COURT: Yes. But the issues of *res judicata* really deals with issues between the same parties.

MR. SHAFER: The arguments we have made is collateral estoppel, Your Honor.

THE COURT: Well, collateral estoppel may or may not fit closer than putting the label *res judicata* on.

MR. SHAFER: I believe our briefs primarily make the argument of collateral estoppel.

THE COURT: I was looking at Mr. Sirkin's proposed findings this morning and constant reference to *res judicata*. There isn't any relation between the plaintiffs in this case to the plaintiffs in *Ellwest*.

MR. SHAFER: No. But we have submitted to the court briefing in regard to the Tennessee law of mutuality of parties not being required in Tennessee under collateral estoppel.

THE COURT: Did Dr. Boatright or Mr. Watkins speak to the question of the fees? And whether the fees covered the expense in administering this ordinance?

MR. CHARLES: Your Honor, Mr. Terry Cobb, who is the director of Codes, his deposition was taken and it's – part of his deposition are cited in the brief as well as the findings of facts.

THE COURT: And you offer that deposition testimony as proof in this record?

[506] MR. CHARLES: Yes, sir, we would like to do that.

THE COURT: All right. There's no objection to it, then you can. And we have never really resolved this notice of filing. Is there any objection by the plaintiff to the court's consideration of this as evidence in the record?

MR. SHAFER: Which one? Is that the secondary effects?

THE COURT: It's 147.

MR. CHARLES: Yes, Your Honor, that's the secondary.

MR. SHAFER: No objection, Your Honor.

THE COURT: This is the information that was placed in front of the metropolitan council.

MR. CHARLES: That's correct, Your Honor.

THE COURT: All right. There is no objection –

MR. SHAFER: No objection.

THE COURT: – to the court's consideration of it. All right.

Well, we'll come back at 1:30. Recess court.

(Whereupon, a recess was had.)

THE COURT: Mr. Shafer, are you ready?

MR. SHAFER: Yes, Your Honor. Your Honor, I had only planned on calling one witness, I need to recall Mr. Rucker for a minute, and I need to introduce two exhibits. I have given them to counsel.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE. INC.,<br>a Tennessee Corporation, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity<br><br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Case No. 3-97-1066<br>Judge Nixon<br>Magistrate Griffin |
| | | Consolidated Cases |
| JERRY C. PENDERGRASS, ET AL.<br><br>Plaintiff,<br><br>v.<br><br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 3-97-1176<br>Judge Nixon<br>Magistrate Judge Griffin |

## DEFENDANTS' ANSWERS TO PLAINTIFFS' INTERROGATORIES AND RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Please identify any and all persons responsible for drafting, or who had input into Chapter 6.54, as originally

introduced, any amendments proposed, accepted or rejected from the date of its introduction on June 3, 1997 to its passage on third reading on August 19, 1997, and any amendments proposed, adopted or rejected subsequent to its approval by the Honorable Phillip Bredesen on August 25, 1997.

**RESPONSE:** Objection. The information sought in this interrogatory is not relevant to the subject matter involved in the pending litigation and is beyond the scope of discovery as it is not reasonably calculated to lead to the discovery of admissible evidence in accordance with the Fed. R. Civ. P. 26(b)(1). Without waiving the objection, videotapes or audiotapes of all Metropolitan Council meetings at which Chapter 6.54 and any amendments thereto were discussed are being furnished plaintiffs in response to document production request no. 2. Copies of minutes of any committee meetings at which Chapter 6.54 or its amendments were discussed are being furnished in response to document production request no. 2.

2. Please identify the source of any textual part of Chapter 6.54 and any amendments proposed, adopted or rejected prior to its initial passage or thereafter which were not originally created or composed by members of the Metropolitan Council, its staff, employees, agents or attorneys, any individual member thereof and/or any council, committee or subcommittee.

**RESPONSE:** Objection. The information sought in this interrogatory is not relevant to the subject matter involved in the pending litigation and is beyond the scope of discovery as is not reasonably calculated to lead to the discovery of admissible evidence in accordance with Fed. R. of Civ. P. 26(b)(l). Without waiving the objection, the one amendment which was proposed and not incorporated into Chapter 6.54 was drafted by Mr. George Barrett.

3. Please identify all general laws of the State of Tennessee authorizing and empowering the Metropolitan County Council of the Metropolitan Government of Nashville and Davidson County to enact regulatory ordinances protecting and promoting the general welfare, health and safety of its citizens.

**RESPONSE:** Objection. This interrogatory asks for a purely legal conclusion. Without waiving this objection, plaintiffs are invited to refer to *Ellwest Stereo Theater Inc. v. Boner,* 718 F.Supp. 1553 (M.D. Tenn. 1989).

4. Please identify each and every of the "governmental interests" that are sought to be furthered or addressed by Chapter 6.54.

**RESPONSE:** Objection. This interrogatory asks for a purely legal conclusion. Without waiving the objection, governmental interests are described in Chapter 6.54 in "Whereas" clauses 4 and 8 and in Section 1 "Purpose," Section 1 "findings" paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 30, 31 and 32.

5. Please identify all persons having knowledge of the nexus or connection between adverse secondary effects of the adult entertainment establishments operated by Plaintiffs or in which Plaintiffs are employed.

**RESPONSE:** Defendants cannot answer this interrogatory due to its confusing wording. Specifically, it asks for the "nexus between the secondary effects of the adult entertainment establishments operated by the plaintiffs" and no other item is listed. The confusion is that the words "nexus" and "between" usually refer to two things to be related and only one is listed in this interrogatory. If plaintiffs will submit a revised version of this interrogatory defendants will serve a response to it.

6. Please identify any and all persons having knowledge that no adverse secondary effects are produced by adult entertainment establishments such as those operated by Plaintiffs in Nashville and Davidson County, Tennessee.

**RESPONSE:** This information is unknown to Defendants.

**STATE OF TENNESSEE )**
**COUNTY OF DAVIDSON )**

I hereby swear/affirm that the answers to the foregoing interrogatories are true to the best of my knowledge, information and belief.

/s/ Donald W. Jones
Donald W. Jones,
Council Staff Director

Sworn to and subscribed before me, a Notary Public, this 23 day of September 1998.

/s/ Roseanne Hayes
NOTARY PUBLIC

My Commission Expires: March 25, 2000

## RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS

Come the defendants The Metropolitan Government of Nashville and Davidson County and Emmett H. Turner and respond to plaintiffs' request for production of documents as follows:

1. Please produce Section 2.01(40) of the Charter of the Metropolitan Government of Nashville and Davidson County.

**RESPONSE:** See responsive document attached.

2. Please produce transcripts and/or tape recordings of any council or council committee hearings at which evidence concerning the adverse secondary effects of adult uses on the community was presented to the Metropolitan Council in the course of its consideration and adoption of Chapter 6.54 and any amendments adopted, rejected or accepted from the time of its original introduction, its passage on third reading, its approval by Mayor Bredesen, and thereafter and transcripts and/or tape recordings of any council or council committee hearings or *debates* at which Chapter 6.54 or any proposed, adopted or rejected amendment was considered, debated or voted upon.

**RESPONSE:** No evidence was presented orally to the Metropolitan Council. Two sets of copies of videotapes or audiotapes of all sessions of the Metropolitan Council at which Chapter 6.54 and any of its amendments were considered are being furnished, one set to Mr. Shafer and one to Mr. Herbison. Copies of minutes of Metropolitan Council committee meetings at which Chapter 6.54 and any of its amendments were considered are being furnished. Defendants believe that a transcript of the July 1, 1997 Council session was taken and is in the possession of Mr. Herbison.

3. Please produce any findings incorporated in the several court decisions listed in Section 1(B) of Chapter 6.54 which were relied upon by the Metropolitan Council in the adoption of Chapter 6.54 and which are not set forth in the printed version of the several cases referred to therein, to wit: *D.L.S., d/b/a Diamonds and Lace Show Bar v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1997); *D.L.S., Inc., a/b/a Diamonds and Lace Show Bar v. City of Chattanooga,* 914 F.Supp. 193 (E.D. Tenn. 1995); *D.L.S., Inc. a/b/a Diamonds and Lace Show Bar v. City of Chattanooga,* 894 F.Supp. 1140 (E.D. Tenn. 1995); *City of Renton* v. *Playtime Theaters. Inc.,* 475 U.S. 41 (1986); *Colin A. Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

**RESPONSE:** There are no documents responsive to this request.

4. Please produce all studies and judicial opinions concerning the adverse secondary effects of adult uses of the communities of Austin, Amarillo and Beaumont, Texas; Phoenix and Tucson, Arizona; Minnesota; Seattle, Washington, which were considered and relied upon by the Metropolitan Council in the adoption of Chapter 6.54.

**RESPONSE:** There are two complete sets of the identical documents presented to the Metropolitan Council when its members considered and voted upon Chapter 6.54 and its amendments. One set of these documents is being furnished to Mr. Shafer and the other set to Mr. Herbison. Contained within these documents is the information sought in this request.

5. Please produce all reports from the police department and from the Department of Health of the Metropolitan Government of Nashville and Davidson County which the Metropolitan Council relied upon in consideration and adoption of Chapter 6.54.

**RESPONSE:** See documents produced in response to request no. 4.

6. Any and all documents submitted to, relied upon or serving as bases for the several conclusions and/or findings of the Metropolitan Council contained in subparagraphs 1(B)1 through 1(B)32 of Chapter 6.54.

**RESPONSE:** See documents produced in response to request no. 4.

7. Copies of any and all reports and recommendations from employees, citizens, other local governments, and other reputable sources as referred to in the third whereas clause on page 1 of Chapter 6.54 which support the conclusion set forth in said whereas clause that "locational criteria alone do not adequately protect the health and general welfare of the people of Metropolitan Nashville and Davidson County" or which support any other conclusion, determination or finding made by the Metropolitan Council in the drafting, consideration and passage of Chapter 6.54, and any amendments thereto whether adopted before or after the passage of Chapter 6.54.

**RESPONSE:** Objection. This request asks for a purely legal conclusion. Without waiving the objection, no responsive documents exist.

8. Please produce copies of any and all reports, studies or evidence showing or demonstrating that there is not a connection or nexus between undesirable adverse

secondary effects in adult entertainment establishments in Nashville and Davidson County or elsewhere or which show that adverse secondary effects produced by adult entertainment establishments such as those operated by Plaintiffs or in which Plaintiffs are employed are no greater than produced by other types of businesses such as convenience stores, gas stations and other places of business which are open and attract customers either on a 24 hour basis or during extended evening hours.

**RESPONSE:** Defendants cannot answer this request due to the confusing wording. Specifically, it asks for "evidence showing or demonstrating that there is not a connection or nexus between undesirable adverse secondary effects in adult entertainment establishments in Nashville and Davidson County or elsewhere" and no other item is listed. The confusion is that the words "nexus" and "between" usually refer to two things to be related and only one is listed in this interrogatory. However, without waiving the objection to the confusing nature of this request, and assuming that Plaintiffs are asking if Defendants have any studies to show that sexually oriented businesses do not cause secondary effects, there are no responsive documents to this request.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE AND DAVIDSON
COUNTY
JAMES L. MURPHY III,
# 9589
DIRECTOR OF LAW

/s/ James L. Charles [FHY]
James L. Charles, #9007
Associate Director of Law

/s/ Francis H. Young
Francis H. Young, #16554
Metropolitan Attorney

/s/ Shayna Abrams
Shayna Abrams, #16702
Metropolitan Attorney
204 Metropolitan Courthouse
Department of Law
Nashville, TN 37201
(615) 862-6341

## CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been mailed to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and the original was mailed to Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 18th day of September, 1998.

/s/ Shayna Abrams
Shayna Abrams

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | |
|---|---|
| DEJA VU OF NASHVILLE, INC., et al.,<br>Plaintiffs,<br>vs.<br>METROPOLITAN GOVERNMENT OF NASHVILLE, AND DAVIDSON COUNTY, TENNESSEE, et al.,<br>Defendants. | No. 3-97-1066<br>Judge Higgins |

---

TRANSCRIPT OF PROCEEDINGS –
PRELIMINARY INJUNCTION

VOLUME II of Three

BEFORE THE HON. THOMAS A. HIGGINS,
U.S. District Judge

on April 14, 1999

---

*APPEARANCES*:

As hereinbefore noted.

[416] DANIEL G. LINZ,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAFER:

Q. Dr. Linz, what is your profession?

A. I am a psychologist by training. I am a university professor and I'm a professor in the Department of Communication and chair of the Law and Society Program at the University of California Santa Barbara.

Q. For those of us who are not in academia, chair means chairman of the department?

A. Yes. We don't say chairman any more. We say chair.

Q. Chairperson?

A. Chairperson or chair.

Q. All right. Where did you grow up?

A. I was born in Cincinnati, but spent most of my life in Kentucky, in north Kentucky, where I attended Northern Kentucky University, and then went from –

THE COURT: Doctor, speak up.

THE WITNESS: Sorry. Born in Cincinnati, but lived most of my life – early life in Kentucky, where I went to Northern Kentucky University.

BY MR. SHAFER:

Q. And, Doctor, did you get a degree at Northern Kentucky University?

[417] A. Actually two degrees; a degree in psychology and a degree in sociology, from Northern Kentucky.

Q. And did you get any degrees after that?

A. Yes. Then I moved to Madison, Wisconsin, where I obtained a master's degree in sociology and a Ph.D. in psychology from the University of Wisconsin Madison.

Q. Now, Doctor, there are psychologists who bring a person in to their office, have them lay down on a bed, and have them tell their tale of woe. Is that the type of psychologist you are?

A. No. I'm a psychologist, but not the fun kind.

Q. Okay.

A. Most of my psychology has to do with numbers and statistics. I'm interested in general patterns of human behavior, and in particular I'm an experimental social psychologist, so what I'm interested in is the factors in one's environment that influence attitudes and behaviors.

Q. Is there a particular phrase for that, experimental psychologist or research psychologist or what?

A. An experimental psychologist, a research social psychologist would be an appropriate term. Over the years my research has concentrated on primarily the effects of mass media on human behavior, primarily in the area of sex and violence in the media.

Q. Would that include forms of entertainment?

[418] A. Yes.

Q. And, Doctor, do you have a resume or curriculum vitae?

A. Yes, I do.

Q. Okay. Doctor, I'm going to hand you what's been marked for identification as Plaintiffs' Exhibit 16 and, sir, is that a copy of your –

A. Yes.

Q. – resume?

A. This is my CV.

Q. Is that, sir, up to date and current?

A. As of February of 1999.

Q. All right.

MR. SHAFER: Your Honor, I move for admission of Plaintiffs' Exhibit 16.

THE COURT: 16 will be received in evidence.

BY MR. SHAFER:

Q. Now, Doctor, the curriculum vitae, I don't want to belabor it, but it goes through all of your professional experiences, correct?

A. Yes.

Q. And where you have taught?

A. Yes.

Q. And what other types of things that you teach?

A. Well, I teach basically four kinds of courses. First it would be what might be termed methodology courses, that is,

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, | ) | |
| INC., et al., | ) | |
| Plaintiffs, | ) | No. 3-97-1066 |
| | ) | Judge Nixon |
| v. | ) | Magistrate Judge Griffin |
| THE METROPOLITAN | ) | |
| GOVERNMENT OF | ) | |
| NASHVILLE AND | ) | |
| DAVIDSON COUNTY, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | | Consolidated Cases |
| JERRY C. PENDERGRASS, | ) | |
| et al., | ) | |
| Plaintiffs, | ) | No. 3-97-1176 |
| | ) | Judge Nixon |
| v. | ) | Magistrate Judge Griffin |
| THE METROPOLITAN | ) | |
| GOVERNMENT OF | ) | |
| NASHVILLE AND | ) | |
| DAVIDSON COUNTY, et al., | ) | |
| | ) | |
| Defendants. | ) | |

---

# **PLAINTIFFS' MOTION FOR REVIEW IN REGARD TO MAGISTRATE'S ORDER AND MEMORANDUM ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER, OR IN THE ALTERNATIVE, MOTION IN LIMINE**

---

Plaintiffs Deja Vu of Nashville, Inc., Michael Rucker, Michael Butler, Meroney Entertainment, Inc., the Pleasure

Palace, Inc., Dawn Pierce, and Elizabeth Martz, through counsel, hereby move pursuant to L.R. Rule 303(f) for review of Magistrate Griffin's Order and Memorandum (in regard to Defendants' Motion for Protective Order) entered October 22, 1998, or in the alternative, for an order in limine, and hereby state in support of such motions, the following:

1. Pursuant to an order from the Magistrate, on or about August 28, 1998, Plaintiffs served upon defense counsels a Fed.R.Civ.P. Rule 30(b)(6) deposition notice setting forth thirty-nine (39) specific areas of inquiry. See Ex. C (all exhibits identified herein are attached to the brief in support of these motions). Pursuant to rule, Defendants were to then designate certain individuals who could testify in regard to these matters.

2. Defendants filed a motion for protective order in regard to this deposition notice, objecting to virtually every one of the designated areas of inquiry. Ex. D. Following receipt of the Plaintiffs' response to that motion (Ex. E) and in furtherance of a telephonic conference held with the Magistrate on October 1, 1998 in regard to these discovery disputes, the Defendants submitted a letter to Plaintiffs' counsels dated October 7, 1998, setting forth four general areas as listed on the deposition notice where they would permit deposition discovery. Ex. F. The Defendants continued to object to any deposition inquiry regarding all other listed areas.

3. On October 22, 1998, the Magistrate issued an Order (Ex. H) and a Memorandum (Ex. I) that – with one exception – granted the Defendants' motion for protective order in its entirety. In addition, even in regard to the one area where the Magistrate permitted discovery, her Order

and Memorandum merely addressed the ability of the Plaintiffs to obtain documents containing "raw data" of certain crime statistics, but did not resolve at all the ability of the Plaintiffs to obtain deposition testimony in regard to such materials from a Rule 30(b)(6) deponent.

4. As areas of inquiry 1-4, 20, 34, and 37 (those matters for which Defendants agreed to produce Rule 30(b)(6) deponents) were not subject to the protective order, Plaintiffs hereby request review of the entirety of Magistrate Griffin's Order and Memorandum. Specifically, Plaintiffs seek review of the Magistrate's ruling in regard to deposition items 5-19, 21-33, 35-36, 38-39. While Plaintiffs have submitted an accompanying brief setting forth the basis of the relief requested and the contentions as to why the Magistrate erred in her Order and Memorandum, the basic reasons that Plaintiffs seek review are as follows:

A. Defendants' motion for protective order was procedurally defective, in that it was not accompanied by a certification as required by Fed.R.Civ.P. Rule 26(c) that "the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action . . . ". In fact, no such conference had occurred.

B. The discovery as requested is both relevant, and is necessary to enable the Plaintiffs to not only be able to respond to the Defendants' motion to lift the preliminary injunction, but also to be able to file a more substantive second motion for preliminary injunction (if the Court lifts the first injunction) detailing the constitutional challenges to all of the other areas of the ordinance in question (generally referred to here as "Chapter 6.54") which Plaintiffs contend are constitutionally infirm.

C. Defendants' motion for protective order, in regard to their claim of legislative privilege, was defective in that it failed to contain the requisite information as set forth in Fed.R.Civ.P. Rule 26(b)(5) so that both the Plaintiffs and the Court could assess the applicability of the claimed privilege.

D. No legislative privilege existed in regard to the specific areas of inquiry designated by the Plaintiffs, which was established by the case law cited by the Defendants themselves in their motion for protective order.

E. In regard to the one area where Magistrate Griffin permitted some limited discovery (Item 32 – criminal statistics or other records or information evidencing criminal activity near businesses in Davidson County which are open and attract customers either on a 24-hour basis or during certain late night hours), she addressed the issue of Plaintiffs being entitled to the actual documents, but did not address whether the Defendants would be required to produce a Rule 30(b)(6) deponent who could testify in regard to such information.

5. In that the discovery as requested is relevant to the ultimate matters that this Court will have to decide, and given the fact that the Defendants have precluded discovery in these areas by invoking claims of privilege and other defenses, should this Court uphold the rulings reached by Magistrate Griffin, this Court should further enter an order in limine precluding the Defendants from admitting, submitting, or forwarding either at the time of trial or during any motion for summary judgment, any evidence or arguments that fit within those areas of inquiry from which the Plaintiffs have been precluded from taking discovery depositions as the direct result of

the Defendants invoking the arguments as contained in their motion for protective order.

**WHEREFORE,** these Plaintiffs request that this Honorable Court enter an order reversing the various decisions of Magistrate Griffin and ordering the Defendants to expeditiously produce deponents who can answer questions concerning the areas of inquiry as found in the Plaintiffs' Rule 30(b)(6) deposition notice, or in the alternative, enter an order in limine precluding the Defendants at any time subsequent in this litigation from submitting any evidence or arguments that relate to those areas of inquiry on Plaintiffs' Rule 30(b)(6) deposition notice where the Plaintiffs have been unable to take such discovery as the result of the Defendants' motion for protective order.

**Dated: November 3, 1998**

/s/ Bradley J. Shafer
Bradley J. Shafer, MI P36604
Shafer & Associates, P.C.
Attorneys for Plaintiffs
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
517-886-6560 – Telephone
517-886-6565 – Facsimile

Michael F. Pleasants
Co-Counsel for Plaintiffs
8 South Third, Suite 200
Memphis, Tennessee 38103
901-572-7332 – Telephone
901-572-7399 – Facsimile

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served, by UPS Next Day Air, upon ***Francis H. Young and Shayna***

***Abrams,*** 204 Metropolitan Courthouse, Nashville, Tennessee 37201; ***John Herbison,*** 2016 Eighth Avenue South, Nashville, Tennessee 37204; ***H. Louis Sirkin,*** 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776; and *Michael Pleasants,* 8 South Third, Suite 200, Memphis, Tennessee 38103, on the 3rd day of November, 1998.

/s/ Bradley J. Shafer
Bradley J. Shafer

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | |
|---|---|
| DEJA VU OF NASHVILLE, INC., et al.,<br>Plaintiffs,<br>v.<br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,<br>Defendants. | No. 3-97-1066<br>Judge Nixon<br>Magistrate Judge Griffin |
| JERRY C. PENDERGRASS, et al.,<br>Plaintiffs,<br>v.<br>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,<br>Defendants. | Consolidated Cases<br>No. 3-97-1176<br>Judge Nixon<br>Magistrate Judge Griffin |

## PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

**-ORAL ARGUMENT REQUESTED-**

Plaintiffs move this Honorable Court for a preliminary injunction pursuant to Fed.R.Civ.P. Rule 65, to enjoin enforcement of an amendment to the Code of the Metropolitan

Government of Nashville and Davidson County, Tennessee, generally denoted as Chapter 6.54 (hereinafter "Ch. 6.54"), and state in support as follows:

1. Plaintiffs are all in the business of presented [sic] to the consenting adult public non-obscene sexually explicit entertainment within the City of Nashville and the County of Davidson, including but not limited to clothed, nude and/or semi-nude performance dance entertainment, videotapes, books, and other expressive materials.

2. To date, the conduct of the Plaintiffs is not in violation of any law of the State of Tennessee, or any local ordinance provision.

3. In late 1997, the Metropolitan Council of Nashville and Davidson County enacted Ch. 6.54.

4. Ch. 6.54 is an extremely lengthy and complex code provision containing numerous and various restrictions, regulations, and prohibitions effecting the constitutionality protected conduct of the Plaintiffs, their agents, representatives, tenants and employees, as well as those individuals from the consenting adult public who seek to purchase, rent, and/or view the entertainment and other expressive media provided and/or presented by the Plaintiffs. In short, Ch. 6.54 is a comprehensive regulatory scheme of establishments and individuals engaged in what is generally referred to as "adult" entertainment.

4. In December of 1997, pursuant to a motion filed by these Plaintiffs, this Honorable Court enjoined Ch. 6.54 for failing to provide prompt judicial review and failing to maintain the status quo during any appeal process in regard to the licensing scheme contained therein. Subsequently, the Metropolitan Council amended the ordinance

and was also able to have the State Legislature enact revisions to a statute which, the Defendants contended, cured the constitutional infirmities noted by this Court. In an Order entered on December 3, 1998, this Court, based on those revisions/enactments, lifted the preliminary injunction.

6. In regard to the previous motion for preliminary injunction, the "Deja Vu" Plaintiffs had only raised these two constitutional concerns, and had specifically reserved the briefing and adjudication on other constitutional claims, pending the outcome of that motion. The "Pendergrass" Plaintiffs raised an additional legal argument; that being that the "criminal disabilities" provisions of Ch. 6.54 were unconstitutional. In enjoining Ch. 6.54 because of the lack of prompt judicial review and the failing to maintain the status quo in the appeal process, this Court declined to rule upon the merits of the Pendergrass Plaintiffs' argument in regard to the criminal disabilities provisions.

7. Pursuant to an Order from Magistrate Griffin, the Plaintiffs are now required to file this motion within 10 working days of December 3, 1998; the date upon which the Order was entered by this Honorable Court lifting the injunction. In addition, pursuant to that same Order from Magistrate Griffin, Plaintiffs are required to raise here "all" constitutional issues upon which they assert serve as bases for further enjoining the ordinance. Magistrate Griffin specifically indicated that she did not want the Plaintiffs to "piece-meal" their motions for preliminary injunction.

8. This motion is therefore filed pursuant to the Order of Magistrate Griffin.

9. For the reasons as set forth in the accompanying brief, Ch. 6.54 is unconstitutional both facially and as applied pursuant to the First Amendment; it is both overbroad and vague; it is impermissibly underinclusive; it otherwise denies these Plaintiffs their constitutional right of process under the Fourteenth Amendment to the United States Constitution; and it violates the liberty interests of these Plaintiffs and others.

10. If this ordinance is not preliminarily enjoined, entertainers will be required to undergo a licensing process no later than Thursday, January 14, 1999, which would require them to disclose highly personal information, be fingerprinted, subject themselves to constitutional deprivations, and disclose such information in a process that are matters of public record so as to raise grave concerns about the personal safety of these entertainers – a matter even acknowledged by the Defendants here.

11. If enforcement of Ch. 6.54 is not enjoined before its "effective" date of January 17, 1999, these Plaintiffs will be irreparably harmed in that they will either be required to disengage in the conducting of constitutionally protected expression, or have to comply with an unconstitutional licensing scheme as discussed above.

12. Plaintiffs have fulfilled the legal requirements entitled them to the injunctive relief sought.

13. Because the deadline for entertainers to file applications for permits (so as to be able to continue to engage in constitutionally protected conduct during the consideration of their permit application and any appeals therefrom) is Thursday, January 14, 1999, and because there are literally hundreds of entertainers within the County who would have to file applications and be fingerprinted before

that date (which will obviously take a great deal of time to accomplish), before Thursday, January 14, 1999, in order to prepare and file applications, and undergo the fingerprinting process.

14. This motion concerns detailed and complex legal arguments that are of the utmost constitutional concern, given the First Amendment rights involved. Accordingly, Plaintiffs request that this Honorable Court grant oral argument in regard to this motion.

WHEREFORE, for the reasons as set forth in this Motion and the accompanying brief, these Plaintiffs respectfully request this Honorable Court to enter a preliminary injunction enjoining enforcement of Ch. 6.54 until such time as this Court has had an opportunity to rule on the full merits of this matter.

Dated: December 16, 1998 /s/ Bradley J. Shafer

Bradley J. Shafer,
MI P-36604
Shafer & Associates, P.C.
Counsel for "Deja Vu"
Plaintiff
3800 Capital City Blvd.,
Suite 2
Lansing, Michigan 48906-2110
517-886-6560 - Telephone

Michael F. Pleasants
Co-Counsel for "Deja Vu"
Plaintiffs
8 South Third, Suite 200
Memphis, Tennessee 38103

H. Louis Sirkin
Counsel for "Pendergrass"
Plaintiffs
920 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202-2776

John Herbison
Counsel for "Pendergrass"
Plaintiffs
2016 Eighth Avenue South
Nashville, Tennessee 37204

# MINUTES
# METROPOLITAN SEXUALLY ORIENTED BUSINESS LICENSING BOARD

The Sexually Oriented Business Licensing Board held its regular scheduled meeting on December 28, 2005 at 5:00 p.m. The following members were present: Carol Etherington, Michael Mitchell, Camille Steward and Doug Sloan. Johnny Crumby was absent. Representatives from Legal Department, Jamie Wyatt and Frank Young, were present. Staff members Tommye Sutton and Linda Borum were also present. Sonny West was present as a representative from Codes Administration.

Mr. Mitchell made a motion to approve the minutes from the meeting of December 14, 2005 as written, Mr. Sloan seconded the motion and the Board voted unanimously.

Ms. Borum reported to the Board that the following entertainer permit applications were in order, # 3, 4, 10, 47, 49, 50, 51, 52, 53, 54, 55, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 83, 85, 190, 195, 198, 199, 200, 201, 202, 203, 205, 206, 207, 209, 210, 211 and 218. Mr. Mitchell made the motion and Ms. Etherington seconded the motion to approve the above entertainer permit applications. The Board voted unanimously to approve.

Ms. Borum reported to the Board that entertainer permit application #162 did not meet the standards under Section 6.54.070(A)(4)(f) and therefore was not in order for approval due to a Prostitution B Misdemeanor conviction March 14, 2005. Mr. Sloan moved to deny the application and Ms. Steward seconded the motion. The Board voted unanimously to deny.

Ms. Borum informed the Board that the following adult entertainment businesses did meet the standards for approval;

Odyssey Gentlemen's Club at 700 Division Street #185
Vivid at 1907 Division Street #196
Purple Onion #1 at 2807 Nolensville Pike #113
Purple Onion #2 at 2702 Dickerson Pike #114
Christie's at 306 8th Avenue South #48
House of Thrills at 709 3rd Avenue South #8
Pleasure Palace at 2407 Dickerson Pike #1
Ken's Gold Club at 500 5th Avenue South #78
Stephanie's Cabaret at 660 Lafayette Street #153
Déjà Vu at 1214 Demonbreun Street #124
Anthony's Show Place at 410 George Davis Boulevard #146

Mr. Mitchell made the motion to approve and Ms. Steward seconded the motion. The Board voted unanimously to approve the following businesses for an adult entertainment license; Odyssey Gentlemen's Club at 700 Division Street #185, Vivid at 1907 Division Street #196, Purple Onion #1 at 2807 Nolensville Pike #113, Purple Onion #2 at 2702 Dickerson Pike #114, Christie's at 306 8th Avenue South #48, House of Thrills at 709 3rd Avenue South #8, Pleasure Palace at 2407 Dickerson Pike #1, Ken's Gold Club at 500 5th Avenue South #78, Stephanie's Cabaret at 660 Lafayette Street #153, Déjà Vu at 1214 Demonbreun Street #124, Anthony's Show Place at 410 George Davis Boulevard #146.

Ms. Borum reported to the Board that a business license for Babylon Adult Video at 905 Division Street #115 does not meet the standards for a license due to the non-compliance of the building inspection by Codes for 6.54.050(A)(1)(b)(v), "the lighting level of each booth shall be a minimum of ten footcandles at all times as measured from the floor". According to the inspection report, the lighting level is only 8.9 footcandles. Ms. Steward made the motion to deny, Mr. Mitchell seconded the motion and the Board voted unanimously to deny the license for Babylon Adult Video at 905 Division Street #115.

Mr. Young told the Board that Mr. Bergeron was unable to attend the meeting because of the death of his Mother. The Board extended their condolences to Mr. Bergeron. Mr. Young asked that the Board defer their request by Mr. Bergeron concerning a definition in the ordinance for video and list of procedures for changing the ordinance. The Board agreed to defer this discussion until the meeting of January 11, 2006.

The Board discussed the inspection sheet used by Mr. Cantrell and asked that the line under Item 9 be clarified as to which number on the inspection sheet it referred to.

Mr. Sonny West was present and the Board asked him to give them a brief history of the adult entertainment business in Nashville. Mr. West told the board the first regulation concerning adult entertainment establishments in Nashville was in 1979. The United States Supreme Court ruling (Detroit) that allowed cities to concentrate in one area of the city as opposed to dispersal throughout the county. At that time, Nashville established that adult entertainment establishments would be limited to "CC" and "CF" districts with distance requirements from a park, school, church, residence and other adult entertainment establishments. This issue was litigated with the Classic Cat Club and was in the court system for about then years. The Court upheld the ordinance as far as locational standards are concerned.

A re-write of the ordinance in 1998 occurred and it was the opinion that municipalities had to provide sufficient sites for businesses to locate and was expanded to three industrial districts in addition to the original "CC" and "CF" districts. An Adult Entertainment Overlay was established and zoning requires that all adult entertainment establishes be located within this overlay. At that time there were approximately six businesses outside the "CC" and "CF" districts, these were "grand-fathered" in and are considered "legally non-conforming establishments". Three of these are now out of business. Council saw a need for regulations as far as from a land use perspective. The Supreme Court also ruled that any bookstore with less than 50% of their stock in adult entertainment goods would be classified as non-adult entertainment. The video stores with over 50% of their stock in sexually oriented entertainment would be classified as adult entertainment establishments. Zoning only deals with locational issues.

Ms. Etherington asked that the board have an organizational meeting. She also asked that more research be done on the 5 year prohibition on adult entertainment licenses and permits for sexual related felony offenses as it would pertain to case law.

Ms. Etherington asked for additional information regarding sex offender recidivism rates, questioning whether there are higher than other offenders, given that multiple states have such strict registration laws.

This concluded our business and we adjourned at 6:50 pm until the next regularly scheduled meeting of January 11, 2006 at 5:00 pm.

Respectfully submitted,

/s/ Linda J. Borum, SECRETARY

## Sec. 18.01. Metropolitan clerk.

There is hereby created and established the office of metropolitan clerk, which shall be charged with the recording and safekeeping of minutes, resolutions and ordinances of the metropolitan council and of all other documents relating to official actions of the metropolitan government. The metropolitan clerk shall also perform such other duties as may be imposed upon him by this Charter or by ordinance. The metropolitan clerk shall act under the supervision and control of the mayor and council.

Any vacancy in the office of metropolitan clerk shall be filled by the appointment of the mayor, subject to the confirmation by the metropolitan council, pursuant to the civil service provisions of this Charter. Such clerk shall have been a resident of the area of the metropolitan government for at least five (5) years preceding the clerk's appointment. The clerk's office shall be a civil service office and compensation shall be fixed in the metropolitan pay plan provided for by article 12. The clerk shall have such clerical help as may be provided by ordinance.

Editor's note – An amendment to the second paragraph of this section, requiring council confirmation of the appointment of the clerk by the mayor, was approved at an election held Aug. 4, 1983

---

## CERTIFICATION

I, Marilyn S. Swing, being the duly appointed Metropolitan Clerk of The Metropolitan Government of Nashville and Davidson County, do hereby certify that the foregoing is a true and exact copy of **18.01** the Charter of

The Metropolitan Government of Nashville and Davidson County, approved in referendum on June 28, 1962, and amended on October 21, 1965; November 8, 1966; August 5, 1971; November 7, 1972; November 5, 1974; November 6, 1976; November 7, 1978; November 4, 1980; August 4, 1983; November 4, 1986; March 8, 1988; August 1, 1991; September 5, 1991; November 3, 1993; November 8, 1994;. November 5, 1996; August 7, 2003; and November 7, 2006.

WITNESS MY HAND and the Seal of The Metropolitan Government of Nashville and Davidson County, Tennessee, this 26th day of February, 2007.

/s/ Marilyn S. Swing
Metropolitan Clerk

STATE OF TENNESSEE )
)
COUNTY OF DAVIDSON )

Sworn to and subscribed before me,
by Marilyn S. Swing this 26th day
of February, 2007.

/s/ Marlene Fuller
Notary Public

My Commission expires: 07/25/09
[SEAL]

# IN THE U.S. DISTRICT COURT
# MIDDLE DISTRICT OF TENNESSEE
# AT NASHVILLE

DEJA VU OF NASHVILLE, INC., )
a Tennessee Corporation, et al, )
Plaintiffs, )
)
v. ) Case No: 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE ) Judge Nixon
AND DAVIDSON COUNTY, ) Magistrate Judge Griffin
TENNESSEE, and EMMETT )
TURNER, Chief of Police, )
in his official capacity, )
Defendants. )

– AND –

JERRY C. PENDERGRASS, et al., )
Plaintiffs, )
) Case No: 3-97-1176
v. ) Judge Nixon
METROPOLITAN GOVERNMENT OF NASHVILLE ) Magistrate Judge Griffin
AND DAVIDSON COUNTY, )
TENNESSEE, )
Defendants. )

---

## DEPOSITION OF TERRY COBB
## TAKEN WEDNESDAY, OCTOBER 21, 1998

---

Reported By:
*MICHELLE E.C. HINSON*
Court Reporter
601 Boyd Mill Avenue, H-2
Franklin, TN 37064
(615) 791-4357

IN THE U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., )
a Tennessee Corporation, et al, )
Plaintiffs, )
)
v. ) Case No: 3-97-1066
METROPOLITAN GOVERN- ) Judge Nixon
MENT OF NASHVILLE ) Magistrate Judge
AND DAVIDSON COUNTY, ) Griffin
TENNESSEE, and EMMETT )
TURNER, Chief of Police, )
in his official capacity, )
Defendants. )

– AND –

JERRY C. PENDERGRASS, et al., )
Plaintiffs, )
) Case No: 3-97-1176
v. ) Judge Nixon
METROPOLITAN GOVERN- ) Magistrate Judge
MENT OF NASHVILLE ) Griffin
AND DAVIDSON COUNTY, )
TENNESSEE, )
Defendants. )

---

DEPOSITION OF MARILYN SWING
TAKEN WEDNESDAY, OCTOBER 21, 1998

---

Reported By:
*MICHELLE E.C. HINSON*
Court Reporter
601 Boyd Mill Avenue, H-2
Franklin, TN 37064
(615) 791-4357

IN THE U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

| | |
|---|---|
| DEJA VU OF NASHVILLE, INC.,<br>a Tennessee Corporation, et al,<br>Plaintiffs,<br>v.<br>METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity,<br>Defendants. | Case No: 3-97-1066<br>Judge Nixon<br>Magistrate Judge Griffin |

– AND –

| | |
|---|---|
| JERRY C. PENDERGRASS, et al.,<br>Plaintiffs,<br>v.<br>METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,<br>Defendants. | Case No: 3-97-1176<br>Judge Nixon<br>Magistrate Judge Griffin |

---

## DEPOSITION OF LON F. WEST TAKEN WEDNESDAY, OCTOBER 21, 1998

---

Reported By:
*MICHELLE E.C. HINSON*
Court Reporter
601 Boyd Mill Avenue, H-2
Franklin, TN 37064
(615) 791-4357

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., )
a Tennessee Corporation, et al, )
Plaintiffs, )
)
vs. ) NO. 3:97-1066
METROPOLITAN GOVERNMENT )
OF NASHVILLE AND DAVIDSON )
COUNTY, TENNESSEE; and )
EMMETT TURNER, Chief of Police, )
in his official capacity, )
Defendants. )

– AND –

JERRY C. PENDERGRASS, et al, )
Plaintiffs, )
)
vs. ) No. 3:97-1176
METROPOLITAN GOVERNMENT )
OF NASHVILLE AND DAVIDSON )
COUNTY, TENNESSEE, )
Defendant. )

---

DEPOSITION OF DONALD JONES

---

DATE & TIME: OCTOBER 28, 1998/9:45 A.M.

LOCATION: SECOND FLOOR, METRO COURTHOUSE NASHVILLE, TENNESSEE

---

REPORTED BY: BEVERLY "BECKY" COLE, RPR, CCR
P. O. BOX 8473
HERMITAGE, TN 37076
(615) 884-0017

1

④

No. 06-1078

Supreme Court, U.S.
FILED
MAR 19 2007
OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

◆

DEJA VU OF NASHVILLE, INC., a Tennessee corporation,
and MERONEY ENTERTAINMENT, INC.,
a Tennessee corporation,

*Petitioners,*

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, TENNESSEE,

*Respondent.*

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

◆

## REPLY TO BRIEF IN OPPOSITION

◆

BRADLEY J. SHAFER
(*Counsel of Record*)
ANDREA E. PRITZLAFF
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
517-886-6560
*Counsels for Petitioners*

MICHAEL F. PLEASANTS
PLEASANTS LAW FIRM
8 South Third, Suite 200
Memphis, Tennessee 38103
901-572-7332
*Co-Counsel for Petitioners*

March 19, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES .......... ii

REPLY TO RESPONDENT'S "STATEMENT OF THE CASE" .......... 1

- I. THE RESPONDENT SIMPLY DOES NOT ADDRESS THE CONFLICTS IN THE LOWER COURTS .......... 4
- II. THE ISSUES IN THE PETITION REST NOT UPON THE QUESTION OF WHETHER IT IS "DIFFICULT" TO WIN A SECONDARY EFFECTS CHALLENGE, BUT RATHER WHETHER SUCH AN ATTACK CAN BE MOUNTED AT ALL .......... 6
- III. THE DISCOVERY PRECLUDED BY THE SIXTH CIRCUIT RULING IS NOT LIMITED TO MATTERS PERTAINING TO LEGISLATIVE "MOTIVATION." .......... 7
- IV. PETITIONERS WERE NEVER AFFORDED A TRIAL ON THE MERITS .......... 9

## TABLE OF AUTHORITIES

Page

CASES

*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) .............. 8

*City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) .............. 4, 7

*Commonwealth v. Jameson*, ___ S.W.3d ___, 2006 WL 3386489 (Ky. Nov. 22, 2006) .............. 5

*Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006) .............. 5

*Illusions-Dallas Private Club, Inc. v. Steen*, ___ F.3d ___, 2007 WL 764484 (5th Cir. March 15, 2007) ........ 7, 8

*Jameson v. Commonwealth*, No. 2003-CA-000967-DG, 2004 Ky. App. LEXIS 229 (August 6, 2004) ............ 5

*Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) .............. 4

*Sensations, Inc. v. City of Grand Rapids*, No. 1:06-CV-300, 2006 U.S. Dist. LEXIS 77159 (W.D. Mich. Oct. 23, 2006) .............. 6

STATUTES, LEGISLATIVE HISTORY, AND ORDINANCES

Tenn. Code Ann. §8-44-101 to 108 .............. 3

Chapter 6.54 of the Metropolitan Code of Laws .......*passim*

FEDERAL RULES OF CIVIL PROCEDURE

Fed.R.Civ.P. Rule 12(c) .............. 6

Fed.R.Civ.P. Rule 30(b)(6) .............. 7

## REPLY TO RESPONDENT'S "STATEMENT OF THE CASE"

Respondent asserts that this case was "tried" in the district court from April 12-15, 1999. Opp. 2. No, it was not. Those are the dates when the lower court conducted an evidentiary hearing on the Plaintiffs' second motion for *preliminary injunction*. *See* App. 1. As stated in the petition, at no time did the district court ever indicate that it was combining the preliminary injunction hearing with the trial; Plaintiffs were *never* afforded a full trial on the merits in regard to their constitutional claims; and the district court even conducted a status conference *after* the evidentiary hearing for the purpose of preparing the case for trial (excerpts of that hearing appear at Pet. App. 423-37).

Next, Metro points out – apparently in an effort to imply that the Plaintiffs "litigated" their secondary effects challenge – that Dr. Daniel Linz testified on behalf of the Plaintiffs at the preliminary injunction hearing and that he has written on, and testified in other matters concerning, the subject of adverse secondary effects. Opp. 2. While Metro includes testimony concerning his credentials (Opp. App. 20-23), missing from the opposition, however, is any reference to Dr. Linz's *substantive* testimony *in this case* concerning adverse secondary effects, which is not surprising because there was none. Dr. Linz testified on other issues, and accompanying this reply is a letter requesting the ability to lodge the full transcripts of his testimony with the Clerk of this Court in order to demonstrate just that.

Then, in a linguistic slight of hand, Metro attempts to convince this Court that the Plaintiffs were somehow *required* to bring *all* of their constitutional challenges against Ch. 6.54 at the preliminary injunction hearing, irrespective of whether those claims were ripe for adjudication at that time. The record in this case simply, but unequivocally, refutes any such assertion. In the Order of October 30, 1999, relied upon by the Respondent (Opp. 3), the Magistrate footnotes the very statement quoted by Metro as follows: "In other words, the plaintiffs shall not piecemeal *motions for preliminary injunction* but shall raise all grounds in support of *a motion for preliminary injunction* at one time." Pet. App. 129 n. 1 (emphasis added). Nothing in that order precluded the Plaintiffs from raising other challenges (or submitting additional evidence) *at trial*.

Nor is Respondent's reference to the motion to review the Magistrate's protective order (Opp. App. 26) dispositive of this issue. All that the Plaintiffs asserted in that document was that the district court should review and reverse the Magistrate's ruling because the requested discovery was relevant to the Plaintiffs' challenges that could be raised in the second motion for preliminary injunction. *But the district court never ruled on that motion*; the Plaintiffs therefore did not obtain their desired discovery; and they therefore did not litigate their "secondary effects" claim in their second motion for preliminary injunction.

Metro also misses the point regarding the Petitioners' description of Board proceedings that occurred *after* the preliminary injunction hearing. Opp. 4-5. The purpose of discussing that evidence, which is part of the district court record below but which was *not* part of the secondary motion for preliminary injunction (since it did not exist at the time), was to illustrate to this Court the evidence that the Plaintiffs *could* have submitted *at trial* on their claim that the challenged Ordinance impermissibly granted unbridled discretion to the Board, if the district court had not vacated the permanent injunction and then contemporaneously re-entered final judgment without affording the Plaintiffs such a trial on their claims. *See* Pet. 28-29.

Moreover, while Metro attempts to assert that the inclusion of one of the Board transcripts was "completely misleading" since Deja Vu ultimately received its license (Opp. 5), such a contention is belied by the simple fact that the Petitioners flat out told this Court that Deja Vu's application was ultimately *granted*. Pet. 8.

Finally, the claim of Metro that a license or permit applicant/holder need not appear before the Board in a public hearing is disingenuous. First, the meetings of the Board are, of course, required to be open pursuant to state statute. T.C.A. §8-44-101 to 108. Second, the Board has the authority to subpoena witnesses to testify before it (§6.54.020(E)(3) (Pet. App. 301)), which could clearly include the applicant. In addition, "[r]efusal or failure [of the applicant] to appear at a reasonable time and place for examination under oath regarding such application or his/her refusal to submit to or cooperate with any investigation," constitutes an admission that the applicant is ineligible for such license and "shall" be grounds for denial thereof by the Board. *See*, *e.g.*, §6.54.040(C)(12) (clarification added) (Pet. App. 311-12). Third, an applicant/licensee would certainly have reason to be present at a hearing regarding the denial of an application or the suspension/revocation of that person's license/permit. *See*, *e.g.*, §6.54.040(E)(1)(c) (Pet. App. 314) and §6.54.150(E)(3) (Pet. App. 349) (an applicant's/licensee's failure to appear at a hearing constitutes a waiver of the right to present evidence to the Board).

## I. THE RESPONDENT SIMPLY DOES NOT ADDRESS THE CONFLICTS IN THE LOWER COURTS.

Initially, the Respondent goes to quite some lengths to argue that governments are not required to justify secondary effects-based laws with empirical evidence. Opp. 7-11. But that is not the conflict raised by the Petitioners, and this Court has held in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), that municipalities need not conduct their own secondary effects studies so long as whatever "evidence" the government relies upon is reasonably believed to be relevant to the problems that it purports to address. *Id.* at 51-52. The problem becomes, however, determining what evidence is *relevant* to attacking, and what amount of evidence is sufficient to *successfully* challenge, a government's contention that certain legislation is necessary because of a concern of adverse secondary effects. And, not surprisingly, the Respondent has failed to articulate any clarity in the lower appellate courts concerning just what evidence *would* either "demonstrat[e] that the municipality's evidence does not support its rationale," or "dispute[] the municipality's factual findings," in terms of the statements in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002).

Rather, Metro simply contends that the "evidence" that a municipality purportedly relies upon is *simply not subject to challenge.* Succinctly, the Respondent states that "[e]xpert testimony or similar studies that question the *truth* of studies upon which a municipality relies are not germane to the *Renton* analysis." Opp. 14 (emphasis in original). But what then, in light of *Alameda Books, is germane* to the *Renton* analysis? The cases as cited in the petition demonstrate that there is no consensus or uniformity whatsoever in the lower courts, and two decisions cited by Metro illustrate this conflict.

In *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006),[1] the Tenth Circuit remanded a secondary effects challenge for further consideration because it did not appear from the record that the trial court even had the supposedly relied upon studies before it in order to be able to evaluate the plaintiff's challenge to that "evidence." *Id.* at 1169. However, in *Commonwealth v. Jameson*, ___ S.W.3d ___, 2006 WL 3386489 (Ky. Nov. 22, 2006), the Kentucky Supreme Court *reversed* a decision of the state court of appeals which had ruled that the criminal defendant there had successfully "cast doubt upon" the government's rationale for enacting the ordinance provisions at issue there. Yet, similar to the circumstances in *Doctor John's*, the purportedly relied upon "studies" were never even submitted into evidence in the trial court there. *See* App. 2-4 (the Commonwealth putting on no evidence at the hearing); and *Jameson v. Commonwealth*, No. 2003-CA-000967-DG, 2004 Ky. App. LEXIS 229, at **29-30 (Aug. 6, 2004) (Mr. Jameson's evidence was "unrebutted").[2]

---

[1] Metro has chosen, in regard to this ruling, to take a cheap shot at the undersigned counsel. Opp. 11 n. 5. Yet, the undersigned did not cite an article which he co-authored as being an "authoritative source," but rather merely pointed out that the *Tenth Circuit United States Court of Appeals* relied upon that paper.

[2] The undersigned was counsel of record for Mr. Jameson in the Kentucky Supreme Court, and further represents this circumstance as an Officer of this Court. In fact, a petition for rehearing is pending based upon the conflict with *Doctor John's* on this issue.

## II. THE ISSUES IN THE PETITION REST NOT UPON THE QUESTION OF WHETHER IT IS "DIFFICULT" TO WIN A SECONDARY EFFECTS CHALLENGE, BUT RATHER WHETHER SUCH AN ATTACK CAN BE MOUNTED AT ALL.

In stating that the "legislative record justifying the enactment [of Ch. 6.54] is sufficient to show the evidence the municipality relied upon," that no discovery on that issue may then be permitted, and that the "objective truth of that evidence" is *irrelevant* (Opp. 18 (clarification added)), Metro argues for a rule that once some type of "study" or "report" is placed into the legislative record – no matter how worthless, flawed, out-of-date, or irrelevant to the issues at hand it may be (*i.e.*, the proverbial "junk science"), and regardless of whether any legislator even reviewed such materials – it becomes sacrosanct and immune to attack. As pointed out in the petition, Metro truly does seek a standard that "evidence" of a secondary effects justification for the enactment of a speech-restrictive law is "irrefutable, irrebuttable, and incontestable." Pet. 23. In light of the Sixth Circuit ruling challenged here, that has, indeed, become just the case within that Circuit.

In *Sensations, Inc. v. City of Grand Rapids*, No. 1:06-CV-300, 2006 U.S. Dist. LEXIS 77159 (W.D. Mich. Oct. 23, 2006), the City of Grand Rapids filed a motion under Fed.R.Civ.P. Rule 12(c) to dismiss the entirety of a challenge to its adult business regulatory ordinance, including the plaintiff's secondary effects attack. In citing to and relying upon the Sixth Circuit ruling that is the subject of this petition, the district court concluded that where "the local ordinance is based on controlling cases finding evidence of secondary effects and approving identical restrictions, discovery may not properly be used to undermine the conclusion reached by those controlling courts." *Id.* at *27.[3] Without then even permitting the plaintiff to mount a secondary effects challenge, the district court there simply granted a motion to dismiss based upon the pleadings. This is where courts are now heading in light of the fractured nature of this Court's opinions on these issues and the Sixth Circuit's ruling in this case. This direction could not have been what this Court contemplated in *Alameda Books*, and the petition should therefore be granted.

## III. THE DISCOVERY PRECLUDED BY THE SIXTH CIRCUIT RULING IS NOT LIMITED TO MATTERS PERTAINING TO LEGISLATIVE "MOTIVATION."

Irrespective of the fact that the Rule 30(b)(6) deposition notice at issue here contained thirty-nine areas of inquiry, many of which had absolutely nothing to do with the secondary effects issue at all, Metro attempts to mislead the Court into believing that the sought after discovery was simply a request to examine the motivations of the individual legislators. Opp. 16-20. That is an interesting claim given the fact that no deposition of an individual council member was even noticed, but in any event it misses the point.

---

[3] The Fifth Circuit has just concluded that the mere reference to judicial opinions discussing secondary effects, if relied upon at the time of legislative enactment, may alone be sufficient to satisfy the substantial governmental interest test. *Illusions-Dallas Private Club, Inc. v. Steen*, ___ F.3d ___, 2007 WL 764484, at **8-11 (5th Cir. March 15, 2007).

The Sixth Circuit ruling at issue is simply not limited to matters of legislative "motivation" privilege. Rather, the appellate court has issued a *blanket* prohibition against the taking of discovery related to the purported secondary effects justification for the enactment of a speech-restrictive law. Moreover, even the Magistrate's legislative immunity concerns cannot serve as any legitimate basis for the broad protective order that was issued. For example, Plaintiffs sought a simple request for a deponent to testify and identify "[e]ach and every governmental interest meant to be furthered" by the provisions of Ch. 6.54 and any amendments thereto. Pet. App. 376-77 (#'s 7-8). This is not an inquiry into *motivation*, but rather an investigation as to the *basis* for the enactment of the law in the first place, which is necessary because – as pointed out in the Petition – Justice Souter's precedential concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), permits the governmental interests to be "made up" during litigation.[4] Pet. 20-22 & n. 9.[5]

In addition, if, as asserted by Metro, the only form of permissible secondary effects attack relates to whether legislative reliance upon the challenged reports and studies was "reasonable" (Opp. 18), that insures that no secondary effects challenge can ever be mounted given the fact that the Respondent further notes that the "motivations" of a legislator cannot be investigated. Respondent (and regrettably the Sixth Circuit) have therefore set up the perfect *"catch 22"* where challenging the secondary effects basis for a speech-restrictive law becomes impossible. For this reason, the petition should be granted.

---

[4] Although the virtual uniformity of this is also now in question. *See Illusions-Dallas Private Club*, 2007 WL 764484, at **8-11.

[5] The Respondent also attempts to obfuscate the issues when describing the depositions that were allowed. Opp. 21-22. First, again, the Sixth Circuit's ruling is a *blanket* prohibition, and would probably not even permit a number of the areas of inquiry that were conducted in this case. Second, and more importantly, it is not insignificant to note that Metro has failed to discuss any of the testimony concerning the four individuals deposed, as none of it related to the critical matters at hand.

## IV. PETITIONERS WERE NEVER AFFORDED A TRIAL ON THE MERITS.

The Respondent does not contend that the district court combined the hearing on the second motion for preliminary injunction with the trial on the merits, as that would be an outright falsehood. Nor does Metro assert that the Plaintiffs were required to put all of their trial evidence into the record at the preliminary injunction stage. All that the Respondent can argue is that – at its request – the Magistrate ordered that the Plaintiffs not piecemeal motions for preliminary injunction, and Plaintiffs do not assert anything to the contrary. It is also significant to note that in her ruling, the Magistrate denied some of the discovery because the requests were *premature in light of the status of the case at that point. See* Pet. App. 119, 124, and 127. A trial, separate and distinct from the preliminary injunction proceedings, was therefore clearly contemplated, as was further discovery. *But Plaintiffs were never permitted any additional discovery after resolution of the second preliminary injunction motion.* Metro is then simply disingenuous when it asserts that the Petitioners "had their day in court." Opp. 23.

Were the Respondent to be correct in this argument, there would have been no basis for the district court to conduct a conference *after* resolution of the second preliminary injunction motion in order to discuss the preparation of these matters for trial. *See* particularly Pet. App. 423 ("THE COURT: All right. Now, ladies and gentlemen, what needs to be done in this case to get this case ready for trial?"). Finally, and most importantly, once the district court lifted the permanent injunction, there was no longer a final judgment in place and the status of the litigation below remitted to the position of two preliminary injunctions having been litigated, *and nothing more*. At that point, Plaintiffs were entitled to a trial, they never received it, and this petition should therefore be granted.

Dated: March 19, 2007.

BRADLEY J. SHAFER
(*Counsel of Record*)
ANDREA E. PRITZLAFF
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
517-886-6560
*Counsels for Petitioners*

MICHAEL F. PLEASANTS
PLEASANTS LAW FIRM
8 South Third, Suite 200
Memphis, Tennessee 38103
901-572-7332
*Co-Counsel for Petitioners*

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION*

DEJA VU OF NASHVILLE, INC., ]
et al. ]
]
v. ]
]
THE METROPOLITAN ]
GOVERNMENT OF NASHVILLE ]
AND DAVIDSON COUNTY, ]
TENNESSEE, et al. ]

No. 3-97-1066
Judge Higgins

## ORDER

The plaintiffs' second motion (filed December 17, 1998; Docket Entry No. 83) for preliminary injunction is set for hearing on oral testimony on Tuesday, April 13, 1999 at 9 a.m.

Proposed findings of fact and conclusions of law shall be submitted (not filed) directly to the Courtroom Deputy, Ms. Pat Lavorini, by the close of business on Monday, April 12, 1999.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
3-31-99

---

* Any typographical and/or incorrect punctuation found in the following pages were intentionally left to show accurately how the original documents appeared.

COMMONWEALTH OF KENTUCKY
McCRACKEN DISTRICT COURT
CASE NO: 00-M-01796
CASE NO: 00-M-01797

| | |
|---|---|
| COMMONWEALTH OF KENTUCKY | PLAINTIFF |
| VS. | |
| JOANN WARNER | DEFENDANT |
| and | |
| COMMONWEALTH OF KENTUCKY | PLAINTIFF |
| VS. | |
| EDWARD GREEN JAMESON | DEFENDANT |

---

## TRANSCRIPT OF EVIDENTIARY HEARING
HON. BARD K. BRIAN, PRESIDING JUDGE
October 18th, 2001

---

Commonwealth represented by:

Hon. Doug McCann
Asst. County Attorney

Defendant represented by:

Hon. Delbert K. Pruitt
Bryant & Kautz PSC

Witness:

Brent Stringer – E911 Director
Melissa Meyer – Shift Manager – The Playhouse
Joann Warner – Defendant

[3] Judge Brian: Okay, we're here on 00-M-1796, 00-M—1797, *Commonwealth vs. Edward Jameson, Commonwealth vs. Joann Warner*. Is that correct gentlemen?

Mr. Pruitt: Yes sir.

Judge Brian: Mr. Pruitt were you going to submit some proof or testimony sir?

Mr. Pruitt: That's correct sir.

Judge Brian: And I believe after that that's all we need to do unless the Commonwealth wants to have some rebuttal proof is that right?

Mr. McCann: Yes sir. Before we start I would like to put it on the record [inaudible]

Judge Brian: Pardon?

Mr. McCann: Would like to note the Commonwealth's objection to [inaudible]

Judge Brian: And are those on the record?

[4] Mr. McCann: Yes Your Honor.

Judge Brian: Okay and Mr.

Mr. Pruitt: What were those objections, just refresh my memory?

Judge Brian: They've been so long ago I don't know that I know.

Mr. McCann: The primary one is that there's been no authority cited to this Court to authorize the evidentiary hearing, in fact the Supreme Court clearly stated and in our studies from other countries [inaudible]

* * *

[42] Mr. Pruitt: I'll do his deposition.

Judge Brian: Let's see, gentlemen, have at least this much briefing and law to look at. That's just part of it. I think there's some other cases cited that I've read but I haven't printed out so I'm going to go ahead and start I think what is going to be the preliminary matter will be the standard of proof. I don't think I need your deposition to do that. So I'm going to go ahead and start getting to work. It will probably be the following the submission of your deposition, it's gonna be at least a couple of weeks before I get you a written opinion. I take it everybody wants a written opinion.

Mr. Pruitt: Yes sir.

Judge Brian: So it's probably going to be at least two weeks following [43] the submission of your deposition Mr. Pruitt. So the quicker I get the deposition the sooner I can give you an opinion because I'm going to go ahead and start the, again I've already reviewed it but I'm gonna start looking at the law again on the preliminary matter regarding the standard of review. Okay.

Mr. Pruitt: Yes sir.

Judge Brian: All right, anything else?

Mr. Pruitt: No sir.

Judge Brian: Mr. Pruitt, Mr. McCann?

Mr. McCann: Nothing at this time.

Judge Brian: Thank you all.